Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1994

JAMES E. KILEY, JR. and MARY C. KILEY,
PETITIONERS

v.

FIRST NATIONAL BANK OF MARYLAND,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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115 pp

QUESTIONS PRESENTED

1. Whether the Maryland courts denied the plaintiffs due process and the equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution and the Maryland Constitution, art. 24 of the Maryland Declaration of Rights, by failing to provide the plaintiffs a fair hearing in the courts, by completely ignoring the plaintiffs' evidence and the inferences to be drawn from it, and by failing to apply controlling legal precedent of the highest court of the state which is absolutely dispositive on each of the material questions before the courts.

2. Whether the Maryland courts denied the plaintiffs their right to a jury trial in a civil case in violation of the Seventh Amendment to the United States Constitution and the Maryland Constitution, art. 23 of the Maryland Declaration of Rights, by deciding material questions of fact in dispute and by entering summary judgment in favor of the defendant while ignoring all the plaintiffs' evidence and all the defendant's admissions that raise inferences from which a jury could reasonably find in favor of the plaintiffs on the claims presented.

3. Whether the notice provisions of the Expedited Funds Availability Act, 12 U.S.C. § 4001, et seq. (1988 & Supp. 1993), and 12 C.F.R. § 229.18 (1994), and the Electronic Funds Transfer Act, 15 U.S.C. § 1693, et seq. (1988 & Supp. 1992), and 12 C.F.R. § 205 (1993) apply to a consumer checking account subject to electronic deposits and transfers when a bank seeks to close the account.

4. Whether a statement of account prepared by a bank, which indicates depositors had sufficient money in their checking account from which two dishonored checks could have been paid at the time they were dishonored, raises a material question of fact whether the account in fact had sufficient funds in it at the time the checks were dishonored.

5. Whether a bank may dishonor its customer's check for insufficient funds by simply placing a hold on the customer's funds in the account without ever informing its customer of the hold on the account.

TABLE OF CONTENTS

Page:

Questions Presented I

Table of Authorities II

Opinions below 1

Jurisdiction 2

Statutes Involved 2

Statement 2

Argument 16

Conclusion 30

TABLE OF AUTHORITIES

Cases: **Page(s):**

Aachen & Munich Fire Ins. Co. v. Guaranty Trust Co., 39 F.2d 578 (2d Cir. 1930) 28

Addressograph-Multigraph Corp. v. Zink, 329 A 2d 28 (Md. 1974) 22

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 18

Adler v. Walker & Dunlop, Inc., 225 A.2d 459 (Md. 1967) 26

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 19

Ankney v. Franch, 652 A.2d 1138 (Md. App. 1995) 23

Antigua Condominium v. Melba Investors, 517 A.2d 75 (Md. 1986) 25

Baltimore Academy of the Visitation v. Schapiro, 181 A. 731 (Md. 1935) 26

Bank of Marin v. England, 385 U.S. 99 (1966) 27

Bank of S. Md. v. Robertson's Crab House, Inc., 389 A.2d 388 (Md. App. 1978) 27

Bank v. Dodge, 124 U.S. 333 (1895) 27

Banks v. Iron Hustler Corp., 475 A.2d 1243 (Md. App. 1984) 22

Bargale Indus. v. Robert Realty Co., 343 A.2d 529 (Md. 1975) 26

Bean v. Steuart Petroleum Co., 224 A.2d 295 (Md. 1966) 22

Cases (Continued): **Page(s):**

Berkey v. Delia, 413 A.2d 170 (Md. 1980) 17, 22
Billman v. Maryland Deposit Ins. Fund Corp.,
583 A.2d 238 (Md. App. 1991) 16
Boyer v. State, 594 A.2d 121 (Md. 1991) 24
Bringe v. Collins, 335 A.2d 670 (Md. 1975) 16
Brooklyn Life Ins. Co. v. Dutcher, 95 U.S. 269 (1877) 20
Brown v. Suburban Cadillac, 272 A.2d 42 (Md. 1971) 24
Cavacos v. Sarwar, 545 A.2d 46 (Md. 1988) 22
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 17, 18, 19, 21
Cicala v. Disability Review Bd., 418 A.2d 205 (Md. 1980) 16
Coffey v. Derby Steel Co., 434 A.2d 564 (Md. 1981) 17
Commonwealth Bank v. Goodman, 97 A. 1005 (Md. 1916) 27
Crawford v. State, 404 A.2d 244 (Md. 1979) 24
Crout v South Carolina Nat'l Bank, 258 S.E.2d 924 (S.C. 1979) . 13-14, 28
Dahl v. Brunswick Corp., 356 A.2d 221 (Md. 1976) 26
Davis v. DiPino, 655 A.2d 401 (Md. 1991) 17, 24, 25
DeGroft v. Lancaster Silo Co.,
527 A.2d 1316 (Md. App. 1987) 17, 22, 24, 25
Demarest v. Manspeaker, 498 U.S. 184 (1991) 28
DiGrazia v. County Executive, 418 A.2d 1191 (Md. 1980) 21, 22
Dietz v. Moore, 351 A.2d 428 (Md. 1976) 24
District Nat'l Bank v. Mordecai, 105 A. 586 (Md. 1919) 25
Duckett v. National Mechanics' Bank, 38 A. 983 (Md. 1897) 27
Dudley v. Baltimore Gas & Elec. Co.,
632 A.2d 492 (Md. App. 1993) 23
Eagle-Picher Indus. v. Balbos, 578 A.2d 228 (Md. App. 1990) 22
Fearnow v. Chesapeake & Potomac Tel. Co.,
655 A.2d 1 (Md. App. 1995) 17, 18, 21
Federated Stores v. Le, 595 A.2d 1067 (Md. 1991) 24
Fenwick Motor Co. v. Fenwick, 265 A.2d 256 (Md. 1970) 17
Fidelity and Casualty Co. v. Dulany, 91 A. 574 (Md. 1914) 21
First Nat'l Bank v. Whitman, 94 U.S. 343 (1877) 27
Geisz v. Greater Baltimore Med. Ctr., 545 A.2d 658 (Md. 1988) 25
Gould v. Transamerican Assoc., 167 A.2d 905 (Md. 1961) 22
Gross v. Sussex Inc., 630 A.2d 1156 (Md. 1993) 17, 20, 21
Hashem v. Taheri, 571 A.2d 837 (Md. App. 1990) 16
Higgins v. Barnes, 530 A.2d 724 (Md. 1987) 16
Hoffman v. Glock, 315 A.2d 551 (Md. App. 1974) 21
Hudson v. Maryland State Housing Co., 114 A.2d 421 (Md. 1955) 26
IBJ Schroder Bank & Trust Co. v. RTC, 26 F.3d 370
(2d Cir. 1994), cert. denied, 115 S. Ct. 1355 (1995) 20

Cases (Continued): **Page(s):**

I.W. Berman Properties v. Porter Bros., Inc., 344 A.2d 65 (Md. 1975) 26
In re Ruskay, 5 F.2d 143 (2d Cir. 1925) 27
Jacobson v. Julian, 229 A.2d 108 (Md. 1967) 23
Katz v. Holsinger, 286 A.2d 115 (Md. 1972) 22
Keco Indus. v. ACF Indus., 316 F.2d 513 (4th Cir. 1963) 26
Kirsch v. Prince Georges County, 626 A.2d 372 (Md. 1993) 24
L&L Corp. v. Ammendale, 236 A.2d 734 (Md. 1967) 26
Laws v. Thompson, 554 A.2d 1264 (Md. App. 1989) 22
Leisner v. Finnerty, 250 A.2d 611 (Md. 1969) 26
Liberty Mutual Ins. Co. v. American Auto. Ins. Co., 154 A.2d 826 (Md. 1959) 22
Local Union No. 626, Brotherhood of Carpenters v. Delaware Contractors Ass'n, 344 F. Supp. 1281 (D. Del. 1972), *aff'd*, 477 F.2d 564 (3d Cir. 1973) 28
Lumbermens Mutual Casualty Co. v. Ely, 252 A.2d 786 (Md. 1969) 17, 23
Master Insulators of St. Louis v. Internat'l Assn. of Heat and Frost Insulators and Asbestos Workers, Local No. 1, 925 F.2d 1118 (8th Cir. 1991) 29
Mattingly v. Mattingly, 607 A.2d 575 (Md. App. 1992) 16
Mayor & City Council v. Crane, 352 A.2d 786 (Md. 1976) 19
McLhinney v. Lansdell Corp., 254 A.2d 177 (Md. 1969) 16
Melrod v. Melrod, 574 A.2d 1 (Md. App.), *cert. denied*, 580 A.2d 1069 (Md. 1990) 23
Murphy v. Edmonds, 601 A.2d 102 (Md. 1992) 24
Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) 28
Old Colony Trust Co. v. Omaha, 230 U.S. 100 (1913) 20
Orkin v. Holy Cross Hospital, 569 A.2d 207 (Md. 1990) 24
Plitt v. Greenberg, 219 A.2d 237 (Md. 1966) 23
Poller v. Columbia Broadcasting Co., 368 U.S. 464 (1962) 21
Rivera v. Prince George's County Health Department, 649 A.2d 1212 (Md. App. 1994) 17
Rosenberg v. Helinski, 616 A.2d 866 (Md. 1992) 24
Rosenthal v. Citizens Bank of Cortez, 266 P.2d 767 (Colo. 1963) 27
Schiller v. Lefkowitz, 219 A.2d 378 (Md. 1966) 19, 23
Schlossberg v. Epstein, 534 A.2d 1003 (Md. App. 1988) 22
Smack v. Jackson, 207 A.2d 511 (Md. 1965) 17
Snoots v. Demorest, 255 A.2d 12 (Md. 1969) 23
Southland Corp. v. Griffith, 633 A.2d 84 (Md. 1993) 17, 24
St. Louis & S.F. Ry. v. Johnston, 133 U.S. 566 (1890) 27

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Stein v. Overlook Joint Venture, 227 A.2d 226 (Md. 1967) 22
Three Garden Village Ltd. Partnership v. United States Fidelity & Guaranty Co., 567 A.2d 85 (Md. 1989) 24-25
Townsend v. L.W.M. Management, Inc., 494 A.2d 239 (Md. App. 1985) 20, 23
Travelers Indemnity Co. v. Nationwide Constr. Co., 224 A.2d 285 (Md. 1966) 22
University Nat'l Bank v. Wolfe, 369 A.2d 570 (Md. 1977) 21
Vincent v. Palmer, 19 A.2d 183 (Md. 1941) 26
Wheeler Transp. Co. v. Katzoff, 219 A.2d 250 (Md. 1966) 22
Wilkerson v. McCarthy, 336 U.S. 53, *reh'g denied*, 336 U.S. 940 (1949) 22
Wright v. Commercial & Savings Bank, 464 A.2d 1080 (Md. 1983) ... 26

Constitutional provisions, statutes and regulations: **Page(s):**

U.S. CONST. Amend. VII 2
U.S. CONST. Amend. XIV, § 2 2
28 U.S.C. § 1257(a) (1988) 2
Electronic Funds Transfer Act,
15 U.S.C. § 1693, et seq. (1988 & Supp. 1992) 2, 12, 28
12 C.F.R. § 205 (1995) 2
12 C.F.R. § 205.8(a) (1995) 2, 12, 13, 28
12 C.F.R. § 205.7(a)(4) (1995) 12-13
Expedited Funds Availability Act,
12 U.S.C. § 4001, et seq. (1988 & Supp. 1993) 2, 12, 28
12 C.F.R. § 229.18(e) (1994) 2, 12, 13, 28
Md. Const. Code Ann. § 23 (1981) 2, 16
Md. Const. Code Ann. § 24 (1981) 2, 23-24
Md. R. Civ. P. 2-311(d) (1995) 25
Md. R. Civ. P. 2-501(e) (1995) 25

Miscellaneous: **Page(s):**

5(A) MICHIE ON BANKS AND BANKING, Ch. 9, § 1 (1994 Repl. Vol.) 27
5(A) MICHIE ON BANKS AND BANKING, Ch. 9, § 9 (1994 Repl. Vol.) 28
5(A) MICHIE ON BANKS AND BANKING, Ch. 9, § 232 (1994 Repl. Vol.) .. 20
5(A) MICHIE ON BANKS AND BANKING, Ch. 9, § 310 (1994 Repl. Vol.) .. 27
5(A) MICHIE ON BANKS AND BANKING, Ch. 9, § 311 (1994 Repl. Vol.) .. 27
6 A. CORBIN, *Contracts* § 1297, et seq. (1962) 26
10 AM. JUR. 2D. *Banks* § 571 (1963 & Supp. 1994) 27
RESTATEMENT (SECOND) OF CONTRACTS § 202, cmt. g (1981) 20
WILLISTON ON CONTRACTS 3d ed. § 623 (1961) 20

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PETITION FOR WRIT OF CERTIORARI

Pro se petitioners James E. Kiley, Jr. and Mary C. Kiley respectfully seek a writ of certiorari to review the opinion and order of the Court of Special Appeals of Maryland affirming the entry of summary judgment in favor of respondent, First National Bank of Maryland ("First National" or "Bank") by the Circuit Court for Montgomery County, Maryland.[1]

OPINIONS BELOW

The Maryland Court of Appeals denied the Kileys' petition for a writ of certiorari to the Court of Special Appeals of Maryland on April 12, 1995. The Court's order is reported at 656 A.2d 772, and is reprinted at Appendix ("App.") 3A, *infra*. The November 30, 1994 opinion of the Court of Special Appeals of Maryland (App., *infra*, 4A-32A) is reported at 649 A.2d 1145. No opinion was issued in the January 3, 1994 summary judgment hearing in the Circuit Court for Montgomery County, but the transcript of that hearing is reprinted at App. 33A-60A, *infra*.

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[1] The Court of Special Appeals affirmed the judgment of the Circuit Court for reasons not ruled upon by the lower court, and for reasons never asserted by the Bank in either court. Therefore, we respectfully request this Court's review of both decisions.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

STATUTES INVOLVED[2]

This case involves the Seventh and Fourteenth Amendments to the United States Constitution, Article 23 of the Maryland Declaration of Rights, and Article 24 of the Maryland Declaration of Rights. This case also involves the interpretation of the notice requirements of the Electronic Funds Transfer Act, 15 U.S.C. § 1693, et seq., codified at 12 C.F.R. § 205.8(a), 205.7(a)(4); and the notice requirements of the Expedited Funds Availability Act, 12 U.S.C. § 4001, et seq., codified at 12 C.F.R. § 229.18(e).

STATEMENT

On July 27, 1992, the Petitioners, acting *pro se*, filed a complaint in the Circuit Court for Montgomery County, Maryland, seeking damages against First National. The complaint alleges that First National breached the deposit contract between the Bank and the Kileys and violated its common-law duties and various duties imposed by state and federal statutes in its handling of petitioner's deposits and checks. The complaint alleges nine claims for damages, including breach of our deposit contract with the Bank, bad faith breach, tortious interference with our paychecks, conversion, tortious interference with our contractual relations, wrongful dishonor, libel, slander, and the intentional infliction of emotional distress. The tort claims are based upon the intentional and negligent acts of the Bank taken in retaliation for the contract dispute, and therefore, because these claims assert violations of the Bank's statutory and common-law duties to the Petitioners, they are independent of the contract claim.

I. The Contract and its Terms

Petitioner James E. Kiley, Jr.[3] opened a checking account with Baltimore Federal Financial ("BFF") at the Montgomery Mall Branch in Bethesda, Maryland, sometime prior to 1986. The terms of the checking account with BFF provided for free checking with interest, no minimum balance requirements, and no monthly service charges. In July 1986, First National purchased the Montgomery Mall Branch from BFF, and acquired all of the depositors' checking accounts opened at the branch.

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[2] The statutes and code sections are reprinted at App. 1A-2A, *infra*.

[3] Petitioner Mary C. Kiley was added to the account on August 22, 1991, as discussed *infra*.

Shortly after its sale to First National Bank of Maryland, Mr. Kiley visited the Montgomery Mall Branch to close his account and move his deposits to another bank. He met with the Branch Manager at the time, Lori Nader, to discuss this intended transaction. In order to induce Mr. Kiley's forbearance from closing the account, Ms. Nader promised him that if he did not close his account with First National, the Bank would continue to provide him with free checking with interest, no minimum balance requirements, and no service charges; she promised him that *these specific terms*[4] "would not be eliminated or changed by the Bank in the future." She stated that these terms were being offered to all the former BFF account holders.[5] She never qualified the offer by stating that the terms were only good for a specified period of time, nor did she disclose any reserved right of the Bank to change the terms in the future. Relying upon her promises, Mr. Kiley did not close his checking account

The Bank admitted in its answers to interrogatories that there was no signature card or other written agreement dating from the time the parties entered into this contract. The Bank further admitted repeatedly in its briefs that the Bank made the promises to Mr. Kiley; the Bank, however, disputes that these terms were intended to be permanent terms.

II. Evidence of the Bank's Contractual Intent

A. Course of Performance - Over the six year period the account was open, in consideration for the promises given to Mr. Kiley, the Bank had the use of the Kileys' funds deposited into the account. The Bank's statements of account admit the Bank's course of performance was in conformity with its contractual commitments to Mr. Kiley. The record also reflects that the Bank continued to honor the original promised terms of its deposit contract with the Petitioners and the other former BFF customers, even while it eliminated such similar accounts of the customers of the Bank who were not former BFF customers, and *even after* Mrs. Kiley was added to the account.

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[4] The Opinion of the Court of Special Appeals states that Mr. Kiley "acknowledged in his deposition that the branch manager never expressly promised that the benefits would remain the same." This takes Mr. Kiley's answer in the deposition out of context. His deposition testimony, when read in its entirety, was that Lori Nader promised that *the specific terms and benefits offered* would not be eliminated or changed in the future; no other features of the account were ever discussed.

[5] In a letter dated June 1986, First National provided written assurances to Mr. Kiley and the other BFF account holders that "any changes to your accounts will be to your benefit." Contrary to the conclusions of the Court of Special Appeals, the Petitioners do not allege this letter forms the basis of their contract with the bank; rather, they allege that the oral promises in the offer made by Lori Nader to obtain Mr. Kiley's forbearance from closing his account and relied upon by Mr. Kiley in not closing his account, give rise to the contract between the parties. The letter is simply evidence of the Bank's intent.

B. Ratification of the Original Contract Terms - In October 1990, without any notice, the Bank changed Mr. Kiley's checking account from an "Investment Checking" account to a "Bonus Checking" account with an undisclosed minimum balance requirement. On November 16, 1990, the Bank charged Mr. Kiley's checking account a $15.00 minimum balance service fee.

On the morning of November 30, 1990, Mr. Kiley met with Ms. Diane Wallace, a branch manager of the Bank, at the former branch office on Wisconsin Avenue, Bethesda. He brought to her attention the Bank's original offer, the original contractual promises, and the Bank's letter dated June 1986. They discussed the Bank's representation that the former BFF accounts' terms would not be changed by the Bank.

After investigating Mr. Kiley's contract claim, Diane Wallace called Mr. Kiley on the telephone at 4:00 p.m. that afternoon, and explained that there had been a computer error that caused the type of his account to change from the "Investment Checking" account with the promised terms, to a "Bonus Checking" account which had a minimum balance requirement. The $15.00 fee resulted from the account falling below the imposed minimum balance requirement.

Ms. Wallace acknowledged that the Bank had promised the specific terms and benefits to the former BFF customers, and acknowledged the specific terms of Mr. Kiley's contract with the Bank. She promised him that the Bank would reinstate the account with the agreed-upon terms and reverse the service charge. She promised that the Bank would continue to provide Mr. Kiley free checking with interest, no minimum balance requirements and no monthly service charges in accordance with the original contract.[6]

The Bank's statements of account from August through December, 1991, made part of the record before the courts below, reflect these changes. The Bank statement of account dated December 17, 1990 reflects both the refund of the service charge and the change in the type of account from a "Bonus Checking" account to a "Checking with Interest" account in accord with Ms. Wallace's promises. Until the breach giving rise to the present dispute, the account continued under the original contract with the promised terms.

III. The Addition of Mrs. Kiley to the Preexisting Account of Mr. Kiley

After the Kileys were married in 1991, they consolidated their respective checking and savings accounts. On August 22, 1991, they met with a Bank officer at First National's Cabin John Branch to discuss opening an account with the same terms as Mr. Kiley's account for Mrs. Kiley and having Mrs. Kiley

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[6] Mr. Kiley recorded his conversations with Diane Wallace on November 30, 1990, in handwritten notes which appear at the bottom of the November statement of account. The Kileys' allegation that the Bank ratified the original terms and reaffirmed the contract by her oral representations and actions was never disputed or refuted by the Bank, nor did the Bank offer her affidavit or her deposition testimony in rebuttal.

added to the preexisting account of Mr. Kiley. The Branch officer told the Kileys that accounts such as Mr. Kiley's had been eliminated by the Bank in a prior year and that such terms were no longer offered by the Bank for new accounts. The Bank officer informed them that the existing accounts with such terms were only being maintained by the Bank for the former BFF customers. The Bank's officer suggested the Kileys open a "Relationship Checking" account for Mrs. Kiley that had no minimum balance requirements, but earned no interest. The Bank's officer represented to the Kileys that in order to add Mrs. Kiley to Mr. Kiley's account, both the Kileys would have to sign a signature card for identification and authorization purposes, and a change information card authorizing the addition of Mrs. Kiley.

At no time during this transaction was there any discussion about any modifications to any of the existing terms of the deposit agreement governing the account (other than adding Mrs. Kiley to the account) or that the Bank intended, by the execution of the signature card, a novation of the preexisting contract. Nor did the Bank's officer mention the Bank's Rules and Regulations, or inform the Kileys that any preexisting terms of their account could or would be affected by the addition of Mrs. Kiley to the pre-existing account. See the Kileys unrebutted, sworn affidavits, reproduced at App. 61A-66A, *infra*.

That same day, after Mrs. Kiley was added to Mr. Kiley's checking account, the Kileys opened the "Relationship Checking" account for Mrs. Kiley. After Mrs. Kiley was added to Mr. Kiley's checking account in August, 1991, the Bank continued to honor the terms it had previously promised Mr. Kiley; it continued to provide free checking with interest, no minimum balance requirements, and assessed no service fees, as disclosed by the account statements in the record.

IV. Facts Relevant to the Petitioners' Claims

A. The Breach of Contract Claim - In December 1991, the Bank wrote to the Kileys and "offered" a choice of several new types of checking accounts, each of which would have eliminated certain terms of the existing account encompassed by the original contract. Relying on the existing contract, Mr. Kiley wrote to the Bank on January 5, 1992 and declined the "offer," informing the Bank of the existing valid contract. The Bank acknowledged Mr. Kiley's letter in a reply letter dated January 17, 1992, but completely ignored the Kileys' claim that a contract existed precluding such changes and merely reiterated its offer. In a second letter to the Bank, the Kileys brought the terms of their contract to the Bank's attention a second time and again declined the Bank's offer. Nevertheless, the Bank changed the terms of the account without notifying the Kileys or informing them of the new terms of their account in writing. On March 16, 1992, the Bank charged the Kileys' account with a $10.00 minimum balance service charge.

B. Facts Giving Rise to the Tort Claims

1. The Tortious Repudiation of Contract Claim (Bad Faith Breach of Contract) - After learning of the breach, the Kileys complained to the Bank about the breach of contract in writing. They also requested in telephone conversations and in writing that the Bank provide them with information about the new terms of their checking account and an explanation for the changes made to the original contract terms. The Bank simply ignored the Kileys' requests for information. When the Kileys persisted, the Bank sent the Kileys a letter dated April 15, 1992, stating that First National intended to close the Kileys checking account on April 24, 1992. This letter was received by the Kileys on Saturday, April 18, 1992, thus providing the Kileys only six days notice that their account would be closed. The Bank's letter further stated that any checks received after April 24, 1992 would be returned marked "account closed."

The Kileys had checks and electronic fund transfers drawn on the account outstanding that would not be received by the Bank by the threatened closing date.[7] Concerned about these outstanding transactions, the Kileys wrote to the Bank on April 19, 1992, requesting that the Bank not close their checking account. The letter informed the Bank that checks and electronic transfers remained outstanding, that the Kileys would be harmed by any dishonored checks, and that the Kileys' contractual obligations would be affected by any dishonor. The letter requested that the Bank respond to the contract issue and provide the requested justification for the breach of the original contract terms. The Bank never responded to this letter, although evidence in the record shows that the Bank received the letter. Nor did the Bank ever explain why it was necessary to close the account on such short notice. A reasonable jury could conclude on the evidence that the Bank was motivated by malice.

a. The Bank Knowingly Waived Closing the Kileys' Checking Account - The record reflects that contrary to its April 15, 1992 letter, the Bank did not close the Kileys checking account on April 24, 1992. The account remained open after that date with funds on deposit until May 18, 1992 and the Bank's statement of account shows that the Bank continued to honor the Kileys' checks received after April 24, 1992, directly contrary to the Bank's April 15, 1992 letter. The record also reflects, through internal Bank memoranda and notes, that the Bank knew that it had failed to close the account on April 24, 1992, that the Bank knew that it continued to accept the Petitioners' checks and deposits after April 24, 1992, and that the Bank knew that the Kileys continued to use their account in reliance on the Bank's inaction.

On April 25, 1992, Mrs. Kiley cashed a $200.00 check in person at First

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[7] An account statement in the record shows that six checks and three electronic fund transfer ("EFT") payments were received and paid by the Bank after April 24, 1992. EFT payments to creditors of the Kileys were paid, one of which was manually posted to the account on April 30, 1992, in the amount of $636.36. These electronic payments had been scheduled for payment before the Bank's April 15, 1992 letter was sent to the Petitioners.

National's Cabin John Branch, the very branch with which the Kileys had been attempting to discuss the contract dispute. Because the Bank had not closed the account on April 24, 1992, as stated in its letter, the Kileys believed that the Bank had reconsidered closing the account. In reliance on the Bank's failure to close the account as stated and its acceptance of the check without hesitation or equivocation, the Kileys issued two other checks that same day.

On April 28, 1992, Mr. Kiley called the Bank's Bethesda branch office and verified that the account was still open and that the three checks issued on April 25, 1992, checks No. 3857, 3858, and 3859, had all been accepted and paid. This confirmed that the Bank had reconsidered closing the account. That the account was still open on April 28, 1992 and checks were being paid against the account was wholly inconsistent with the Bank's asserted intention of closing the account on April 24, 1992 and of returning Petitioners' checks marked "account closed." Relying on the Bank's inconsistent acts as confirmation that the Bank had reconsidered closing the account, the Kileys began to use their checking account as before, expecting the bank would contact them regarding the contract dispute as requested in the Kileys' April 19, 1992, letter.

The Kileys were prepared to notify their employers not to deposit their direct deposits into the account if in fact the Bank closed the account on April 24, 1992; however, specifically because the Bank did not close the account and continued to accept their checks, the Kileys did not contact their employers to stop the regularly scheduled direct deposits.[8]

b. The Bank Closed the Account Without Any Notice - Internal Bank documents in the record show that on April 27, April 28, and April 29, 1992, Bank employees discussed the Bank's failure to close the account on April 24, 1992. These same documents also show that the Bank knew that it continued to honor Petitioners' checks after the stated closing date and that the Kileys continued to use the account in reliance on the Bank's inaction. Without ever informing the Kileys of this fact, or providing the Kileys with any notice whatsoever, the Bank placed a hold on the Kileys' funds on April 29, 1992, and closed the account that day. The Kileys did not learn that the Bank closed the account until nearly a week later, on May 4, 1992. (None of the Banks correspondence dated April 29, 1992, was received until May 4, 1992.)

The Kileys asserted below that it was patently unfair for the Bank to knowingly permit the Kileys to believe that the Bank had reconsidered closing the account and then close the account suddenly without any notice whatsoever. Internal Bank communications and memos show that the Bank's employees were aware of the Kileys' reliance and were discussing whether to close the

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[8] In its Opinion, the Court of Special Appeals indicates the Kileys were negligent in not closing their account and opening an account elsewhere. App. 17A. This ignores the Kileys' written request to the Bank not to close the account. Moreover, it ignores the Kileys argument and evidence that the Bank's conduct constituted an apparent, intentional waiver of its intent to close the account. Under Maryland law, negligence is a question of fact for the jury.

account in light of its continued acceptance of the Kileys' checks and deposits. The Bank never disputed any of the Kileys' factual allegations nor did it controvert any of the evidence in the record supporting the Kileys assertion that the Bank was equitably estopped from denying it waived closing the account. The Bank's brief completely ignored this argument and the evidence supporting it, asserting only that it acted in compliance with its Rules and Regulations.

2. The First Wrongful Dishonor and the Slander Claim - On April 29, 1992, unaware that the Bank intended to close the account, the Kileys issued a check in the amount of $40.00 to Vanessa Defreitas, and a check to Marine Midland Bank in the amount of $1,111.87 for their mortgage payment. Two days later, on May 1, 1992, Ms. Defreitas called the Kileys and left an angry message on their answering machine stating that their check to her, in the amount of $40.00, had been dishonored when she presented it for payment at one of the Bank's branch offices earlier that afternoon. The sworn affidavit of Vanessa Defreitas shows that the Bank dishonored the check, allegedly due to insufficient funds, on May 1, 1992 when she presented it to the Bank for payment. App. 70A-71A. This affidavit, undisputed and unrebutted by the Bank, was part of the record before the courts below. Account statements in the record show that $482.47 was on deposit and available on May 1, 1992 from which the check could have been paid on the date it was dishonored. See App. 76A.

The Bank admitted by its conduct that its initial dishonor of the check to Vanessa Defreitas was wrongful by subsequently paying the check four days later. In fact, the Bank's briefs before the Court of Special Appeals admit the Bank dishonored this check on May 1, 1992, but assert that the check was dishonored for insufficient funds because the Bank placed a "hold" on the Kileys' account on April 29, 1992. In its briefs the Bank asserted that because of the hold on the account, the account had "effectively, a zero balance," notwithstanding the Bank's statement of account which showed an actual balance of $482.47. The Kileys' evidence supporting this claim was unrebutted.

3. The Tortious Interference With Paycheck Claim [Negligent Misrepresentation], and the Conversion Claim - On the morning of May 4, 1992, Mr. Kiley called the Cabin John Branch and spoke with the Branch Manager at the time, Kathy Michael, to find out why the check to Vanessa Defreitas had been dishonored. Ms. Michael told Mr. Kiley the Bank had closed the Kileys' account on April 29, 1992. (The Petitioners thus learned on May 4, 1992, for the first time, that their account had been closed on April 29, 1992.) During this conversation, Kathy Michael told Mr. Kiley that his direct-deposit paycheck, in the amount of $1003.96, had been received on April 30, 1992, and had been accepted and deposited into the account; she also said that Mrs. Kiley's direct-deposit paycheck, in the amount of $877.06, had been received by the Bank on May 1, 1992, but had been rejected back to Mrs. Kiley's employer. The Kileys believed, based upon the representations of Kathy Michael, that the Bank had sufficient funds on deposit to pay all the Kileys' outstanding checks. At no

time during his conversation with Ms. Michael, did she warn Mr. Kiley that a hold had been placed on the account preventing payment of any of the Kileys' checks or that any checks could or would be dishonored. Mr. Kiley's handwritten notes recording this conversation, was made part of the record below and was brought to the courts attention in the Kileys' briefs.

Because of the representations of Kathy Michael, on May 4th and 5th, 1992, the Kileys contacted Mrs. Kiley's employer to try to obtain a replacement paycheck. Because of her representations, they made no further inquiry about the status of Mr. Kiley's paycheck. Her employer informed the Kileys that her direct deposit paycheck had not been returned to the employer. Based upon the information obtained, the Kileys believed the Bank had accepted both direct deposits rather than just Mr. Kiley's direct-deposit as the Bank had represented.

Relying upon the representations of Kathy Michael that the Bank had accepted Mr. Kiley's direct-deposit paycheck, and believing the Bank had in fact accepted Mrs. Kiley's direct-deposit paycheck as well, Mr. Kiley sent a letter to the Bank dated May 6, 1992, demanding an accounting and demanding the immediate return of any funds held by the Bank. First National never responded to this letter although the record shows that the Bank received the letter.

The statement of account shows that in fact, the opposite occurred: the Bank rejected Mr. Kiley's direct-deposit paycheck received on April 30, 1992, but then subsequently received and *manually deposited* Mrs. Kiley's direct-deposit paycheck the very next day into an account the Bank *knew was closed*. Documents in the record show the Bank's employees were fully aware that they had rejected Mr. Kileys direct-deposit paycheck and that they had deposited Mrs. Kileys' direct-deposit paycheck the next day. The Kileys did not learn until May 15, 1992 that Mr. Kiley's deposit had been rejected, and did not receive a replacement paycheck from his employer until a week later. The Bank's misrepresentations regarding the status of the deposits and failure to return the Kileys remaining funds in the account until May 18, 1992, effectively denied the Kileys access to any of their funds and deposits for almost a month, leaving the Kileys insolvent. The Kileys argued that under the circumstances of this case, the Bank had a fiduciary duty to provide accurate information. The Bank never disputed this claim nor controverted any of the Kileys' evidence supporting it.

4. Tortious Interference with Contract Claim

Because the Bank misled the Kileys with regard to the status of their direct-deposits and withheld the Kileys' funds after it said it closed the account and disbursed all funds; and because the Bank failed to respond to the Kileys' written demand for any additional funds on deposit; the Kileys became insolvent. The cumulative actions of the Bank left the Kileys without any access to their deposits and the Kileys were unable to pay several of their bills as they came due. The record discloses the Kileys were forced to borrow money.

The Bank never disputed the Kileys evidence in the record supporting this claim; instead, the Bank baldly asserted that the Kileys had access to their funds

and had sufficient funds to meet these bills without providing any evidence in support of the Bank's naked assertion of fact.

5. The Second Wrongful Dishonor and Libel Claims

On May 7, 1992, First National dishonored the Kileys' mortgage payment to Marine Midland Bank, in the amount of $1,111.87, returning the check to Marine Midland marked "insufficient funds." In the Bank's answers to the Kileys' interrogatories (App., *infra*, 72A-74A), the Bank's Vice President and Associate Counsel, Richard J. Carroll, Jr. testified that the Bank received the Kileys' mortgage check for payment on May 7, 1992, but returned the check unpaid *the same day* for insufficient funds. He further testified that "the amount of available funds in [the Kileys' checking] account on both the beginning and end of the day on May 7, 1992 was approximately $198.46."

The Bank's answer to interrogatory No. 16 (App., *infra*, 74A) is directly refuted by the Bank's own statement of account. *See* App., *infra*, 76A. The statement of account for the period shows that the Bank actually had $1,319.53 on deposit the entire day on May 7, 1992, more than enough to cover the Kileys' mortgage payment of $1,111.87 on the date it was first received. Because the Respondent's own account records show that the account had $1,319.53 on deposit until May 8, 1992, it is a material question of fact whether the account actually had insufficient funds in it on May 7, 1992.

Bank employee, Darlene Zwier's handwritten notes of May 6, 1992 admit the Bank had at least $1,300.00 in the account on that date: after acknowledging receipt of Mrs. Kiley's direct deposit, she wrote "$1,300 00 in there now." Her notes of May 7, 1992 show the Bank was aware it had received the Kileys' mortgage check for payment on that date, that the Bank's employees were discussing whether to pay the Kileys' mortgage check with a certified check, and that the Bank's employees were questioning whether the Bank was legally bound to pay it. Her admissions are consistent with the actual status of the account according to the account statement provided by the Bank. The record reflects that Mr. Richard J. Carroll, Jr. directed other employees of the Bank not to pay the mortgage check *after* being informed by an employee of the Bank, Mary Sweeney Tappan, that the Bank had accepted and deposited Mary C. Kiley's direct deposit paycheck *and* after being informed the Bank had honored some checks and dishonored others after the alleged closing on April 29, 1992. The handwritten notes and the deposition testimony of Darlene M. Zwier discussed above corroborate his testimony.

The Kileys suffered damages as a result of First National's dishonor of this check, including a late charge, insufficient funds ("NSF") check return charge, additional interest charges, and injury to their reputation. The Bank never refuted any of the Kileys' evidence or that it dishonored the check. Rather, the Bank admitted dishonor of the check in its briefs but asserted a privilege based upon insufficient funds because of the hold on the funds in the account. The Court of Special Appeals found as a fact, *sua sponte*, that the account had

insufficient funds in it because of the hold on the account.

6. The Intentional Infliction of Emotional Distress Claim - As shown through the Kileys' briefs and evidence, the Kileys were forced into insolvency, forced to suffer unnecessary embarrassment and shame by the intentional dishonor of their checks, forced to borrow money, and suffered emotional damages as a result of the Bank's actions. As disclosed in the record, during the approximately four-week period from April 15th until mid-May, Mr. Kiley was in the final weeks of the semester in his second year of law school *and* in his final semester of graduate school. He worked full-time during the entire time he was in law school and graduate school. During this same period, Mrs. Kiley was constantly traveling for her employer.

The six-days actual notice provided by the Bank of its intent to close the Kileys account caused Mr. Kiley severe anxiety because of the Kileys' electronic transfers and checks outstanding. Because of their schedules and commitments, neither of the Kileys had time to research a new account on such short notice. These event occurred just as Mr. Kiley was entering his final exams. These events caused Mr. Kiley severe sleeplessness, irritability, and depression, resulting in an ulcer. It affected his sleep and his studies, and adversely affected his grades in school (he received the lowest grades that semester of any semester during the entire seven-year period he was in night school).

This claim was supported by the unrebutted affidavit of Mrs. Kiley and the evidence of the Bank's knowledge of wrongdoing and negligence discussed in the claims above. The record evidence shows that the Bank's employees acted intentionally with full knowledge of their duties to the Kileys. A reasonable jury could infer from these acts, and find in favor of the Kileys, that the Bank acted with intentional, actual malice. Why else was it necessary to close the account on such short notice? Accordingly, the Kileys argued in their briefs below that the cumulative negligent and intentional acts of the Bank, if sufficiently proven to a trier of facts, would warrant a finding in their favor on all these claims.

VIII. The Summary Judgment Hearing Before the Circuit Court

On October 25, 1993, the Bank moved for summary judgment alleging that the Bank's Rules and Regulations alone governed the contract dispute. Asserting that the Bank acted pursuant to its Rules and Regulations in closing the account, the Bank claimed it was therefore entitled to summary judgment on all of the Kileys' claims, including the tort claims.

In response, the Kileys cross-petitioned for summary judgment. The Kileys' brief set forth the facts above, and supported their version of the facts with 24 attached exhibits, including the Kileys' and Ms. Defreitas' sworn affidavits (each dealing with a material question of fact before the court, i.e., the intent of the parties in adding Mary Kiley to the account; the dishonor of the check to Ms. Defreitas; and the emotional distress suffered by Mr. Kiley); the statements of

account discussed above; the Bank's answers to interrogatories; the Banks response to the Kileys' discovery request showing no signature card or contract was executed when the contract came into existence; the Bank employees' internal documents and memos providing evidence of the Bank's knowledge of its ambiguous acts, knowledge of its duties owed to the Kileys, and its intentional disregard of those duties from which a reasonable jury could find actual malice; and other documentary evidence supporting the Kileys' claims. Additionally, the Kileys made approximately 65 references to admissions contained in the Bank's various briefs in the record, and to other evidence and documents already in the record supporting their claims.

The Kileys' brief meticulously disputed each fact and piece of evidence put forth by the Bank with references to the evidence in the record that supported the Kileys' version of those facts. The Kileys asserted that the Bank's statement of the facts was incomplete; the Bank's statement of the facts ignored many relevant facts and the evidence in the record supporting the Kileys' claims while conveniently presenting others in a way that distorted the reality and significance of the facts. All the Kileys' claims were well-documented and supported by admissions and evidence in the record and the case law. Rather than address the Kileys' claims or the supporting evidence, however, the Bank chose simply to ignore the evidence and distort the facts.

The Kileys' brief disputed that the Bank's Rules and Regulations were ever made a part of the contractual relationship between the parties. Pointing out that a bank's Rules and Regulations is an adhesion contract and that a bank may waive its Rules and Regulations, the Kileys argued that the undisputed evidence raises a material question of fact whether the Rules and Regulations were properly made part of the contract between the parties or whether the Bank knowingly waived any contrary terms in the Rules and Regulations by its subsequent ratification of the specific terms of the contract. These arguments and the Kileys evidence supporting them were totally unrebutted by the Bank.

After arguing that the Bank closed the account in bad faith (no valid cause; implied agreement not to close account without just cause; no notice after apparent waiver), the Kileys also argued that the Bank's notice of its intent to close the account was inadequate as a matter of federal law. Relying on the notice requirements of the Electronic Funds Transfer Act, 15 U.S.C. § 1693, et seq., codified at 12 C.F.R. § 205.8(a), 205.7(a)(4) (App., *infra*, 1A) ("EFTA"); and the notice requirements of the Expedited Funds Availability Act, 12 U.S.C. § 4001, et seq., codified at 12 C.F.R. § 229.18(e) (App., *infra*, 2A) ("EFAA"), the Kileys argued that because the account was undisputedly subject to electronic transfers and electronic deposits, the Bank was required to provide, at minimum, the notice mandated for changes in terms by the regulations under the plain wording of the statutes and regulations.

The Kileys argued that the EFTA required the Bank to provide at least 21 days notice of "any change in a term or condition required to be disclosed under

§ 205.7(a) if the change would result in...fewer types of available electronic fund transfers, or stricter limitations on the frequency or dollar amounts of transfers," 12 C.F.R. § 205.8(a), rather than the six days notice it actually provided. The Kileys also argued the EFAA mandated that "[a] bank shall send a notice to holders of consumer accounts at least 30 days before implementing a change to the Bank's availability policy regarding such account." 12 C.F.R. § 229.18(e). Because the Bank deposited Mrs. Kileys electronically deposited paycheck received on May 1, 1992 and failed to make those funds available to the Kileys by dishonoring their mortgage payment when it was received for payment on May 7, 1992, the Kileys argued that closing the account without notice constituted a material change in the terms of the "Bank's availability policy regarding" the Kileys' account requiring the mandated 30 days notice. The lower court ignored these arguments and the regulations in reaching its conclusions.

Alternatively, the Kileys argued that the notice was insufficient as a matter of fact, especially since electronic funds transfers were outstanding on the date of closure and because of the Bank's apparent reconsideration. The Kileys' brief argued that under Maryland law, a jury could reasonably find that the Bank was estopped from denying it waived closing the account, because it knowingly permitted the Kileys to rely on its apparent waiver as disclosed by the evidence in the record. The Bank never disputed the Kileys' arguments or evidence supporting the Kileys' claim of a waiver, nor did it try to explain or refute the Bank's internal memos and notes showing the Bank knew the Kileys continued to use the account in reliance upon the Bank's failure to close the account.

In the Bank's reply brief, the Bank failed to refute (or even acknowledge) the Kileys' allegations of fact or rebut the evidence in the record supporting the Kileys' claims. Instead, the Bank merely reasserted its claim that the Bank's Rules and Regulations authorized the actions of the Bank. After admitting the Bank had dishonored the Kileys' checks, the Bank asserted that the dishonor was justified because the Bank had placed a hold on the Kileys' funds on April 29, 1992, and asserted that "the account had, effectively, a zero balance in it" on the date the checks were dishonored. The Bank never disputed any of the sworn affidavits offered by the Kileys nor the allegations of facts in them. It was within the Bank's power to refute them with the sworn affidavits of its employees with knowledge of the facts, its failure to do so when we cross-petitioned for summary judgment is especially notable.

The summary judgment hearing was held January 3, 1994, in the Circuit Court for Montgomery County, Maryland. Because this is a very fact-specific case with numerous bits of evidence in the record, Mr. Kiley prepared certain pages of critical evidence and information to present to the trial judge to assist the court in understanding the basis of the Kileys' claims. This brief package included the Bank's answers to Interrogatories No. 15 and 16, the statement of account for the period in which the Kileys' checks were dishonored, the affidavit of Vanessa Defreitas, a copy of the one-page decision in *Crout v. South*

Carolina Nat'l Bank, 258 S.E.2d 924 (S.C. 1979), the handwritten notes of Darlene M. Zwier, a copy of the notice requirements of the EFTA and EFAA, and certain admissions of the Bank (internal Bank communications and specific admissions raising inferences of intent) with respect to this litigation.[9]

At the summary judgment hearing, the court allowed the Bank's counsel to present all First National's evidence to the court. Mr. Kiley requested, and was denied on five separate occasions (*See* App., *infra*, 49A, 49A, 50-51A, 57A, and 59A), the opportunity to approach the bench and provide the court with the Kileys' evidence that was relevant to the issues before the court. This unfairly prevented the Kileys from providing the court with highly persuasive evidence and presenting their case effectively before the court.

After considering only the Bank's evidence, the court entered summary judgment in favor of the Bank. The court ruled that summary judgment was proper on the basis that neither waiver nor promissory estoppel applied to the contract claim; concluded that the Bank's Rules and Regulations applied to the contract dispute (without providing any explanation of how the court reached that conclusion), and then granted summary judgment on all the tort claims, concluding the Bank's Rules and Regulations authorized all the actions of the Bank. The court never concluded as a matter of fact that the Kileys' account had insufficient funds in it when the Bank dishonored the Kileys' checks and it never stated that the parties had entered into either a modification or novation of the original contract terms when the Kileys signed the signature card in 1991.

The transcript reflects that although the judge concluded on the record that there were no material facts in dispute, the judge apparently never read the Kileys' brief and completely disregarded the Kileys' evidence in reaching its conclusions. Because the Kileys cross-petitioned for summary judgment and First National never disputed the Kileys' evidence, the court should not have entered judgment in the Bank's favor as a matter of law.

IX. The Appeal to the Court of Special Appeals of Maryland

The Kileys appealed the summary judgment ruling to the Maryland Court of Special Appeals. Noting the unfair treatment afforded the Kileys in the summary judgment hearing concerning the opportunity to present evidence, the Kileys pointed out that First National never met its initial burden of showing that no material facts were in dispute, and the Bank failed to show it was entitled to summary judgment on any of the claims as a matter of law. The Kileys argued that the lower court erred in entering judgment in favor of the Bank because the record evidence and the reasonable inferences to be drawn therefrom raise

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[9] Although these documents were in the record or were exhibits to the Kileys' brief, the Kileys believed that these documents were crucial to establishing that material facts were in dispute on certain claims requiring a jury determination.

material questions of fact that could not be resolved as a matter of law *as a matter of law*. The Kileys pointed out that under Maryland law, the question of whether promissory estoppel or waiver applies to the facts of a case are material questions of fact to be resolved by a trier of fact, and that the court erred in making those determinations of fact as a matter of law.

The Court of Special Appeals affirmed, finding as a matter of fact, *sua sponte*, that the parties either "agreed" to modify the terms of the original agreement, or else "agreed" to enter into a novation of the original contract:

> To support their claims as to breach of contract, promissory estoppel, and waiver, the Kileys rely, primarily, on the Bank's conduct prior to the time that Mrs. Kiley was added to the account. *We conclude that, when Mrs. Kiley joined the account, all of the parties agreed to specific contractual terms that superseded any other contractual terms*. . . . Our holding renders irrelevant the Bank's conduct prior to August, 1991 with respect to these particular claims.

App. 11A. What the parties "agreed" to is a question of fact, and the factual conclusion reached by the court *sua sponte* is unsupported by the record. The court subsequently found that the Bank's conduct in changing the terms of the account and in closing the account complied with the Bank's Rules and Regulations, and that its notice to close the account also "complied with the contractual terms." App. 15A. The court rejected the Kileys arguments that the Bank's notice of intent to close the account was insufficient as a matter of law, concluding, as the Bank had asserted in its briefs, that the EFTA and EFAA did not apply when a bank closes its customers account. The court found that the notice was neither insufficient as a matter of law or fact, finding the Kileys were negligent in failing to close the account. Whether the Kileys were negligent under the circumstances of this case is also a material question of fact.

Finally, after acknowledging that the Bank had placed a hold on the Kileys' funds on April 29, 1992, and disregarding the Kileys unrebutted assertion that they had no notice of either the closure of the account on that date or were ever made aware of the hold placed on the account, the court concluded, as a matter of fact, that the Kileys had insufficient funds in their checking account on the date the Bank dishonored each of the two checks. This *sua sponte* conclusion of fact ignores the Bank statement of account that showed sufficient funds on both dates that the Kileys' checks were dishonored. Finding as a fact the account had insufficient funds in it when the checks were dishonored, the court affirmed the lower court's grant of summary judgment on all the tort claims.

X. Petition to the Court of Appeals of Maryland for a Writ of Certiorari

Claiming errors of fact, law, and procedure in both courts below, the Kileys timely filed a petition for a writ of certiorari in the Maryland Court of Appeals. The Court denied the Kileys' petition for a writ of certiorari on April 12, 1995.

ARGUMENT

The Maryland courts have denied the Petitioners their fundamental rights to a jury trial on issues of fact, by denying the Petitioners due process and the equal protection of the laws guaranteed under the Seventh and Fourteenth Amendments to the United States Constitution and under the Maryland Constitution, arts. 23 and 24 of the Maryland Declaration of Rights.

In *Higgins v. Barnes*, 530 A.2d 724, 733 (Md. 1987),[10] the Court of Appeals held, after reviewing the historical background of Article 23, that the Court is "constitutionally required to 'inviolably preserve' the right of trial by jury in actions at law." "Article 23 of the Maryland Declaration of Rights, like the Seventh Amendment of the United States Constitution, guarantees a right to a jury trial in actions at law." *Mattingly v. Mattingly*, 607 A.2d 575, 578 (Md. App. 1992), *citing*, *Bringe v. Collins*, 335 A.2d 670 (Md. 1975). "[T]he discretion of the court is very narrowly limited and must, wherever possible, be exercised to preserve jury trial. Accordingly, if the case presents any legal issues...the case is to be tried to a jury.'" *Mattingly*, 607 A.2d at 579 (internal citations omitted). *See Cicala v. Disability Review Bd.*, 418 A.2d 205 (Md. 1980) (party in a civil proceeding is entitled to a jury trial on any questions of fact). The Docket Sheet in the Circuit Court shows that the Kileys requested a jury trial at the outset of this action.

" 'If a claim is brought that historically would have been filed on the law side of the court and a jury trial is properly demanded, a jury will hear the case.' *Hashem v. Taheri*, 571 A.2d 837, 839 (Md. App. 1990) *citing* P. Niemeyer and L. Richards, *Maryland Rules Commentary* 125 (1984)." *Billman v. Maryland Deposit Ins. Fund Corp.*, 583 A.2d 238, 244 (Md. App. 1991). Finding that "claims for breach of contract are historically legal," the Maryland Court of Appeals in *Higgins* determined that a party to a lawsuit "was entitled to a jury trial on that and any other issue raised...which the court determined to be 'legal' ..." *Higgins*, 530 A.2d at 731. Because the Kileys' claimed breach of contract, because the other claims sought legal relief, and because the Kileys' claims were supported by undisputed evidence that raised inferences regarding material facts (contractual intent; sufficiency of funds on deposit) on which "reasonable minds could reach a different conclusion," *McLhinney v. Lansdell Corp.*, 254 A.2d 177, 181 (Md. 1969), the Kileys have a Constitutionally guaranteed right to a jury trial in Maryland.

Under Maryland law, "a motion for summary judgment may be granted *only if* "there is no genuine dispute as to any material fact and . . .the party in whose favor judgment is entered is entitled to judgment as a matter of law.'

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[10] In *Higgins*, the Court of Appeals reversed a directed verdict denying a defendant a jury trial on a counterclaim alleging a breach of contract, finding that the legal issues presented "were clearly the type of legal issues historically subject to trial by jury." 530 A.2d at 733.

MD. RULE 2-501(e)." *Davis v. DiPino*, 655 A.2d 401, 404 (Md. 1991) (emphasis added), *citing Southland Corp. v. Griffith*, 633 A.2d 84, 87 (Md. 1993). "The purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue of fact sufficiently material to be tried." *Rivera v. Prince George's County Health Dept.*, 649 A.2d 1212, 1232 (Md. App. 1994); *Gross v. Sussex Inc.*, 630 A.2d 1156, 1160 (Md. 1993). "The court, in ruling on a motion for summary judgment, *must consider* the pleadings, depositions, *answers to interrogatories, admissions and affidavits* submitted by the parties. Md. Rule 2-501(e)." *DeGroft v. Lancaster Silo Co.*, 527 A.2d 1316, 1318 (Md. App. 1987) (emphasis added). "In determining whether a genuine dispute of material facts exists the court examines the pleadings, admissions, and affidavits, etc., *resolving all inferences against the moving party. . ..*" *Gross*, 630 A.2d at 1160 (emphasis added). "Even where the underlying facts are undisputed, if those facts are susceptible of more than one inference, the choice between them should not be made as a matter of law, but should be submitted to the trier of fact." *Berkey v. Delia*, 413 A.2d 170, 171 (Md. 1980), *citing, Fenwick Motor Co. v. Fenwick*, 265 A.2d 256, 258 (Md. 1970). "Under [the] Maryland rule[s], a party is not entitled to a directed verdict in his favor unless the facts and circumstances are such as to permit *of only one inference* with regard to the issue presented." *See Lumbermens Mut. Cas. Co. v. Ely*, 252 A.2d 786, 789 (Md. 1969) (emphasis added), *citing, Smack v. Jackson*, 207 A.2d 511, 512 (Md. 1965). "Credibility is not an issue to be resolved on summary judgment." *Coffey v. Derby Steel Co.*, 434 A.2d 564, 568 (Md. 1981).

The Maryland courts "recognize that a grant of summary judgment is appropriate only where a two-fold test is met. The movant for summary judgment must (I) clearly demonstrate the absence of any genuine issue of material fact, and (ii) demonstrate that it is entitled to judgment as a matter of law." *Fearnow v. The Chesapeake & Potomac Tel. Co.*, 655 A.2d 1, 10 (Md. App. 1995), *citing, Gross*, 630 A.2d at 1164 (internal citations omitted). In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), this Court set forth the burden of the movant in meeting the first prong of this two-part test:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and *identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.*"

477 U.S. at 323 (emphasis added). "To satisfy the first part of this test, the moving party must present the material facts necessary to obtain judgment and demonstrate that there is no material dispute as to any of those facts.... It is the burden of the movant to 'identify the portions of the record that

demonstrate the absence of a genuine issue of material fact.'" *Fearnow*, 655 A.2d at 10. "This burden on the moving party may be discharged by 'showing'--that is, pointing out to the ... court--that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. "The party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." *Celotex*, 477 U.S. at 322 (emphasis in original), *quoting, Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970).

While a moving party is not required "to produce evidence showing the absence of a genuine issue of material fact ... with respect to an issue on which the nonmoving party bears the burden of proof" at trial, 477 U.S. at 325, a moving party cannot simply ignore the evidence in the record supporting a non-movants' evidence when moving for summary judgment: "Having chosen to base its motion on the argument that there was no evidence in the record to support the plaintiff's claim, Celotex was not free to ignore supporting evidence that the record clearly contained. Rather, Celotex was required, as an initial matter, to attack the adequacy of this evidence." *Celotex*, 477 U.S. at 336 (Brennan, J., and Blackmun, J., dissenting). "The nonmoving party may defeat a motion for summary judgment that asserts that the nonmoving party has no evidence by calling the Court's attention to supporting evidence in the record that was overlooked or ignored by the moving party." *Id.*, at 332 (Brennan, J., and Blackmun, J., dissenting).

In meeting its initial burden of production, a moving party must either "show" the court that there is no evidence to support an issue on which the non-movant bears the burden of proof at trial, or attack the evidence of the nonmovant by "showing" that the nonmoving party's evidence cannot support the nonmovant's claim or defense, *e.g.*, the evidence in support of the claim or defense would be inadmissible at trial. *See Celotex*, 477 U.S. at 322 (Reversing the circuit court's grant of summary judgment after finding circuit court's majority "declined to consider petitioner's argument that none of the evidence produced by respondent in opposition to the motion for summary judgment would have been admissible at trial."). "[I]t is only by attacking all the record evidence allegedly supporting the non-moving party that a party seeking summary judgment satisfies [the rule's] burden of production." *Id.*, 477 U.S. at 332 (Brennan, J., and Blackmun, J., dissenting). The moving party's failure to meet this initial burden will be grounds for reversing the entry of summary judgment. *Adickes*, 398 U.S. at 157. In this case, the Kileys pointed out, in detail, the evidence discussed above supporting their claims that was ignored by the Bank in its motion before the Circuit Court. This evidence was also pointed out to the reviewing courts.

"Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a

verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) "We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury *might* return a verdict in his favor. If he does, there is a genuine issue of fact that requires a trial." 477 U.S. at 257.

"We conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. ... [T]he trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant." *Anderson*, 477 U.S. at 255. "In civil cases, the party who has the burden of proof on an issue must only persuade the trier of the facts that the preponderance of the evidence is on his side." *Schiller v. Lefkowitz*, 219 A.2d 378, 384 (Md. 1966). Accordingly, the Kileys were merely required to persuade the trier of facts under a "preponderance of the evidence" standard that they were entitled to judgment on the claims.

Under these standards, as pointed out to all the courts below, First National never met its initial burden of production. It never pointed out to the court, on any of the claims, that there was an absence of evidence to support the Kileys' claims. Nor did the Bank ever attack any of the Kileys' evidence claiming that it would be inadmissible at trial, as did the petitioner in *Celotex*, entitling that petitioner to summary judgment. 477 U.S. at 322. Instead, the Bank simply ignored, as did the trial court and the reviewing courts, all the evidence and inferences in the record that supported the Kileys' claims.

Although the Bank admits that the promises regarding the terms of the account were made to Mr. Kiley, the Bank disputes that the promised terms were intended to be permanent. The Bank relied solely on its assertion that its Rules and Regulations[11] governed the outcome of the breach of contract dispute, and demanded summary judgment on all the claims. The Bank provided no evidence to support its naked assertion of contractual intent, and failed to dispute the Kileys' evidence supporting the Kileys' assertion of the intent of the parties when the contract was formed. Under Maryland law, a party "may make an offer by...which, if accepted and acted upon by another in compliance with its terms, may give rise to a contract, the obligation of which is *constitutionally protected* against impairment." *Mayor & City Council v. Crane*, 352 A.2d 786, 791 (Md. 1976) (emphasis added).

The record contains substantial undisputed evidence from which the

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[11] The Kileys strongly disputed whether First National's Rules and Regulations were ever made part of the contract between the parties. The Bank admitted there was no "signature card, contract, or other written agreement" executed by Mr. Kiley incorporating the Rules and Regulations at the time the contract came into existence. *See* App. 75A, *infra*.

Bank's contractual intent may be inferred by a reasonable jury, and a reasonable jury could conclude the parties never intended a modification or novation of the original terms when the signature card was executed in 1991. The initial contractual intent[12] of the parties and the intent of the parties when Mrs. Kiley was added to the account are material questions of fact on which reasonable minds could differ and would "affect the outcome of this case." A reasonable jury could find that the Bank knowingly waived any contrary terms in its Rules and Regulations when it ratified the contract.[13]

The Bank and the courts ignored critical evidence in the record that raised inferences supporting the Kileys' claims or refuted the Bank's asserted facts and these disputes are both genuine and material. Reasonable minds could differ as to whether the Kileys' account had insufficient funds in it when the Bank dishonored the two checks, and whether the Bank's

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[12] *See Gross*, 630 A.2d at 1163 ("Taken in the light most favorable to the petitioners, we hold that, *either there is a dispute of material fact as to whether the respondents made the critical representation, or there is a material dispute of fact as to the intent with which the representation was made*. In either case, the trial court erred in granting summary judgment on this basis." (emphasis added). *See Townsend v. L.W.M. Management, Inc.*, 494 A.2d 239, 245-46 (Md. App. 1985) (What a reasonable person in the appellant's shoes, in light of the words and actions of the appellee would have perceived and believed in a particular situation is a question of fact. "The sufficiency of those words or actions, and their effect, are *factual determinations*.") (emphasis added)

[13] *See IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp.*, 26 F.3d 370, 374 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1355 (1995):

> For over a century, courts have looked to the conduct of the parties in resolving ambiguities in contractual language. In *Brooklyn Life Ins. Co. v. Dutcher*, 95 U.S. 269, 273 (1877), the Court said:
>
> > The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done.
>
> In *Old Colony Trust Co. v. Omaha*, 230 U.S. 100, 118 (1913), the Court said:
>
> > Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence.
>
> * * * See also 4 WILLISTON ON CONTRACTS 3d ed. § 623 ("An important aid in the interpretation of contracts is the practical construction placed on the agreement by the parties themselves."); RESTATEMENT (SECOND) OF CONTRACTS § 202, cmt. g ("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning.")

See also 5(A) MICHIE ON BANKS AND BANKING, Ch. 9, § 310, at 373 (1994 Repl. Vol.) (a court may consider the practical interpretation given to a depositor's agreement with a bank by the parties before any controversy arose).

communications to third parties were "knowingly false" or made with "reckless disregard" for the truth. Similarly, reasonable minds could find that the Bank converted Mrs. Kileys' paycheck, and knowingly misled the Kileys with respect to their deposits. They could find that the Bank knowingly waived closing the account by its unambiguous failure to close the account in accordance with its letter of April 15, 1992, and find that the Kileys were not negligent in relying on the Bank's unambiguous acts in continuing to honor the Kileys' checks. Finally, from all the evidence, a reasonable jury could infer that the Bank acted with actual malice and knowingly and intentionally sought to injure the Kileys. There was certainly sufficient evidence in the record to support a finding, under a preponderance of the evidence standard, in the Kileys' favor on each of these claims. The inferences to be adduced from all the evidence cannot be resolved as a matter of law, because "cases that primarily raise issues of intent are... generally ill-suited for summary judgment *due to the need for greater than usual factual development*." *Gross*, 630 A.2d at 1161 (emphasis added), *citing*, *DiGrazia v. County Executive*, 418 A.2d 1191, 1196 (Md. 1980). "Summary judgment is inappropriate when intent and motive are critical to the proof of a case." *Poller v. Columbia Broadcasting Co.*, 368 U.S. 464, 473 (1962).

As discussed above, simply ignoring the evidence in the record does not suffice for "pointing out" to the court that there is an absence of evidence to support the nonmoving party's case. Nor does this meet the *Celotex* standard of pointing out that the plaintiffs' evidence could not support a finding in favor of the Kileys at trial because it would be inadmissible at trial or for any other reason. Accordingly, the Bank failed to meet its initial burden of production, the lower court erred in entering summary judgment in favor of the Bank, and the Court of Special Appeals erred in affirming.

If a movant meets it initial burden, there remains the burden of showing under the applicable law that the movant is entitled to judgment as a matter of law, the second prong of the summary judgment rule. *Fearnow*, 655 A.2d at 10. Assuming, arguendo, that the Bank met the first prong of its initial burden of production, it could not show that it was entitled to summary judgment as a matter of law because the very issues to be determined were material questions of fact that must be presented to a jury, *as a matter of law*, if there was *any evidence* from which a reasonable jury could conclude in favor of one party or the other. Cases that raise questions of waiver;[14] *University Nat'l Bk. v. Wolfe*, 369 A.2d 570, 576 (Md. 1977) ("It is manifest, that *whether subsequent conduct of the parties amounts to a modification*

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[14] *See also Hoffman v. Glock*, 315 A.2d 551 (Md. App. 1974) (whether subsequent conduct of the parties amounts to a modification or waiver of their contract is generally a question of fact to be decided by the trier of fact); *Fidelity and Casualty Co. of N. Y. v. Dulany*, 91 A. 574, 577 (Md. 1914) ("Whether or not there has been a waiver of such a right under a contract is generally a question of fact.")

or waiver of their contract is generally a question of fact to be decided by the trier of fact.") (emphasis added); and promissory estoppel,[15] *DiGrazia*, 418 A.2d at 1196 ("*Estoppel is a question of fact*, to be determined in each case. *Any such determination should have been made only after a full trial.* Accordingly, the trial judge erred in granting the motion for summary judgment.") (emphasis added); require submission to a jury for factual determinations as a matter of Maryland law. *See Travelers Indemnity Co. v. Nationwide Constr. Co.*, 224 A.2d 285, 292 (Md. 1966), *citing*, *Gould*, 167 A.2d at 909 ("Waiver is closely inter-related and intertwined with estoppel. ... We have repeatedly stated that whether or not an estoppel exists is a question of fact to be determined in each case.").

Similarly, cases involving modification, negligence,[16] contributory negligence,[17] intent and motive,[18] also require factual determinations by a trier of facts. All these elements were part of the Kileys' claims and were part of the material questions before the Maryland courts; matters that could not have been resolved by the courts as a matter of law *as a matter of law*.

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[15] *See Gould v. Transamerican Assoc.*, 167 A.2d 905, 909 (Md. 1961) ("*Whether estoppel exists is a question of fact* to be determined on a case-by-case basis."); *Addressograph-Multigraph Corp. v. Zink*, 329 A.2d 28 (Md. 1974) (same); *Bean v. Steuart Petroleum Co.*, 224 A.2d 295 (Md. 1966), *citing*, *Liberty Mutual Ins. Co. v. American Auto. Ins. Co.*, 154 A.2d 826 (Md. 1959) ("Estoppel depends upon the facts and circumstances of each case.")

[16] *Wilkerson v. McCarthy*, 336 U.S. 53, 55, *reh'g denied*, 336 U.S. 940 (1949) (reversing the Supreme Court of Utah after finding that the Court independently resolved conflicting testimony on negligence); *Eagle-Picher Industries, Inc. v. Balbos*, 578 A.2d 228, 244-45 (Md. App. 1990) *citing Banks v. Iron Hustler Corp.*, 475 A.2d 1243 (Md. App. 1984) ("Negligence is a relative term and must be decided upon the facts of each particular case. Ordinarily it is a question of fact to be determined by the jury.")

[17] *Wheeler Transportation Co. V. Katzoff*, 219 A.2d 250 (Md. 1966) (reversing and remanding for jury determination whether plaintiff was contributorily negligent); *Stein v. Overlook Joint Venture*, 227 A.2d 226, 231 (Md. 1967) ("[T]he question as to whether or not the [party] was contributorily negligent should have been submitted to the jury."); *Schlossberg v. Epstein*, 534 A.2d 1003 (Md. App. 1988) (material question of fact precluded summary judgment; contributory negligence jury question)

[18] *Berkey*, 413 A.2d at 171 ("[S]ince the question deals with the state of mind of defendants, plaintiff ought to be able to have their testimony before the trier of fact in open court on cross-examination."); *DeGroft v. Lancaster Silo Co.*, 527 A.2d 1316, 1323 (Md. 1987) ("[C]ourts have been reluctant to affirm the grant of summary judgment where . . .a contract is involved because they view the determination of the predominant purpose of a transaction a question of fact."); *Cavacos v. Sarwar*, 545 A.2d 46 (Md. 1988) (what the parties intended by the terms called for by contract was a question for the jury); *Katz v. Holsinger*, 286 A.2d 115, 118 (Md. 1972) (holding that testimony concerning oral agreement between landlord and tenant was "sufficient to present a jury issue."); *DiGrazia*, 418 A.2d at 119 (when issue of motive or intent is at issue, generally motion for summary judgment should not be granted"); *Laws v. Thompson*, 554 A.2d 1264, 1270 (Md. App. 1989) ("Intent is 'particularly inappropriate' for decision by summary judgment because it can rarely be be established by direct evidence....")

In this case, the Kileys' undisputed allegations[19] were supported by substantially more than a "scintilla" of evidence that raised inferences of intent, waiver and estoppel that could not be resolved as a matter of law by the trial court *as a matter of law*. The trial court implicitly "invaded the province of the jury" by granting summary judgment in favor of the Bank based upon its independent determination 1) that the parties did not intend the promised terms to be permanent, 2) that the Rules and Regulations were properly made part of the contract between the parties, and 3) that neither waiver nor estoppel applied when the Kileys' allegations of fact and the evidence clearly support inferences of both waiver and estoppel.[20]

Compounding the error of the trial court in weighing the evidence, the court ruled after hearing only one party's evidence; the court unfairly denied the Kileys the opportunity to present their evidence to the court after allowing the Bank to present its evidence. Accordingly, the court reviewed only the Bank's evidence at the hearing before ruling and never considered the Kileys' evidence at the hearing. Under Maryland law, this was fundamentally unfair and an abuse of discretion warranting reversal. *Ankney v. Franch*, 652 A.2d 1138, 1153 (Md. App. 1995) (reversing where lower court ruled after hearing only one party's evidence and refusing other party's request to admit evidence). *See Melrod v. Melrod*, 574 A.2d 1, 13 (Md. App.), *cert. denied*, 580 A.2d 1069 (Md. 1990) (same).

"A ruling on a motion for directed verdict *requires the trial judge to consider the evidence presented*, together with all reasonable and legitimate inferences deducible therefrom, in the light most favorable to the party against whom the motion is made." *Townsend*, 494 A.2d at 244. Indeed, the court's refusal to review the Kileys' evidence after reviewing the Bank's evidence at the hearing prevented it from being viewed "in the light most favorable" to the non-moving party.

"Litigants in civil matters are as much entitled to due process of law and all it implies as are defendants in criminal prosecutions. The constitutional guarantees apply alike to rights of life, liberty and property." *Schiller v. Lefkowitz*, 219 A.2d 378, 384 (Md. 1966). Article 24 of the Maryland Declaration of Rights, equated by the Maryland courts with the Fourteenth Amendment, guarantees that "no man ought to be...deprived of his life,

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[19] *Dudley v. Baltimore Gas & Elec. Co.*, 632 A.2d 492, 503 (Md. App. 1993) (where the factual allegations in a claim of breach of contract and negligence are totally unrebutted, it is reversible error to enter summary judgment in favor of defendant on the claims)

[20] "If there is any legally relevant and competent evidence, however slight, from which a rational mind could infer a fact in issue, then a trial court would be invading the province of the jury by declaring a directed verdict. In such circumstances, the case should be submitted to the jury and a motion for a directed verdict denied." *Snoots v. Demorest*, 255 A.2d 12 (Md. 1969); *Lumbermens Mut. Cas. Co. v. Ely*, 252 A.2d 786 (Md. 1969); *Jacobson v. Julian*, 229 A.2d 108 (Md. 1967); *Plitt v. Greenberg*, 219 A.2d 237 (Md. 1966).

liberty, or property, but by the judgment of his peers." MD. CONST. CODE ANN. § 24 (1981). *See Crawford v. State*, 404 A.2d 244 n. 3 (Md. 1979). In *Kirsch v. Prince Georges County*, 626 A.2d 372, 375 (Md. 1993), the Court of Appeals stated that "[a]lthough the Maryland Constitution does not contain an express equal protection clause, we have long held that equal protection is implicitly guaranteed by the due process provision found in Article 24 of the Declaration of Rights." *See also Murphy v. Edmonds*, 601 A.2d 102, 107 (Md. 1992) ("[I]t is settled that the Due Process Clause of the Maryland Constitution,...embodies the concept of equal protection of the laws to the same extent as the Equal Protection Clause of the Fourteenth Amendment.") Under Maryland law, a court "must consider" the evidence submitted by the parties, *DeGroft*, 527 A.2d at 1318, *citing*, Md. Rule 2-501(e), when ruling on a summary judgment hearing, and the court's failure to do so in this case violated the Kileys due process rights. *Crawford v. State*, 404 A.2d 244 (Md. 1979) ("Fair trial in a fair tribunal is a basic requirement of due process.") The Kileys have been deprived of a constitutionally protected property right in their contract with the Bank without due process of law.

Turning now to the Opinion of the Court of Special Appeals, it is readily apparent that the court sought not to determine whether the trial court was legally correct in entering summary judgment, but to affirm the judgment of the trial court. "[O]ur cases have consistently held than in appeals from ...a motion for summary judgment..., *an appellate court must focus on whether the trial court properly ruled on the motion before it.*" *Davis v. DiPino*, 655 A.2d 401, 405 (Md. 1995) (emphasis added). "An appellate court, in reviewing a motion for summary judgment, should be concerned primarily with deciding whether or not a factual dispute exists, and in this regard, all inferences should be resolved against the party making the motion." *Dietz v. Moore*, 351 A.2d 428, 431 (Md. 1976), *citing*, *Brown v. Suburban Cadillac*, 272 A.2d 42, 44 (Md. 1971). *See also Southland*, 633 A.2d at 87, *citing*, *Rosenberg v. Helinski*, 616 A.2d 866 (Md. 1992) ("In reviewing a disposition by summary judgment, an appellate court resolves all inferences against the party making the motion.").

"Ordinarily, an appellate court should review a grant of summary judgment *only on the grounds relied upon by the trial court.*" *Federated Stores v. Le*, 595 A.2d 1067, 1071 (Md. 1991) (emphasis added), *citing*, *Boyer v. State*, 594 A.2d 121, 136 (Md. 1991); *Orkin v. Holy Cross Hospital*, 569 A.2d 207, 210 (Md. 1990). "It is important that we identify the basis relied upon by a trial court in granting summary judgment because, in the event that basis is erroneous, 'the appellate court will not ordinarily undertake to sustain the judgment by ruling on another ground, not ruled upon by the trial court, if the alternative ground is one as to which the trial court had a discretion to deny summary judgment.' " *Three Garden Village Ltd.*

Partnership v. United States Fidelity & Guaranty Co., 567 A.2d 85, 89 (Md. 1989), *quoting, Geisz v. Greater Baltimore Med. Ctr.*, 545 A.2d 658, 66- n. 5 (Md. 1988).

In *Davis*, the Maryland Court of Appeals found that the Court of Special Appeals improperly prejudiced the plaintiff in that case by *sua sponte* resolving an issue that was not properly before the trial court. The Court ruled that "an appellate court that determines that summary judgment was improper but nonetheless proceeds to affirm a trial court's judgment [on an issue], even though that issue was not argued or decided at the trial level, acts beyond the scope of appellate review contemplated by Md. Rule 8-131(a)." *Davis*, 655 A.2d at 404. Quoting *Antigua Condominium v. Melba Investors*, 517 A.2d 75, 85 (Md. 1986), the Court found that it was error for the Court of Special Appeals to resolve an issue without giving the plaintiff in that case "a reasonable opportunity to present. . .additional pertinent material. We cannot exercise the discretions which are in the first instance committed to the trial court." *Davis.*, 655 A.2d at 405. Finding that such a determination on appeal from a directed verdict is intrinsically "unfair," the Court concluded that "it is clear that [the petitioner] was prejudiced by the Court of Special Appeals' *sua sponte* determination," of issues not properly raised or argued in the trial court. *Id.* "If the trial court never decided [an issue], an appellate court should not consider that issue." *Id.*

The Opinion of the Court of Special Appeals relies upon its initial finding, as a matter of law, that the parties *intended either* a modification or a novation of the preexisting contract when Mr. Kiley executed the signature card for the sole purpose of adding Mrs. Kiley to his preexisting account. In this case, First National never asserted the signature card was intended either to be a modification or novation of the preexisting contract before either court, nor did the trial court ever rule on the issue. Furthermore, "[u]nder Md. Rule 2-501, whenever a motion for summary judgment is based on facts not contained in the record or papers on file it must be supported by an affidavit properly executed in accordance with Rule 2-501(c)." *DeGroft*, 527 A.2d at 1321, *citing*, MD. R. CIV. P. 2-311(d). Thus, even if the Bank had alleged the parties intended either a modification or novation, the Bank was required to provide an affidavit supporting this conclusion since there were no facts in the record upon which such a conclusion regarding the intent of the parties could be based. Just as the court in *DeGroft* concluded, "[a]t the time of appellee's motion, none of the materials of record indicated," 527 A.2d at 1321, what the parties intended, neither does the record in this case anywhere indicate that the parties intended either a novation or modification of the original contract terms. "In that respect alone, there was a material dispute as to a material fact precluding summary judgment." *DeGroft*, 527 A.2d at 1322.

Seventy-six years ago, in *District Nat'l Bank v. Mordecai*, 105 A. 586, 588 (Md. 1919), the Maryland Court of Appeals set forth the elements

necessary to establish a novation:

> A novation may be made by the substitution of a new obligation or contract between the same parties, *with the intent to extinguish the old obligation or contract; but it does not result from substitution of one paper writing for another, or one evidence of debt for another, or one contract for another, unless such substitution is made with the intention of all parties concerned to extinguish the old one.*

Id. (emphasis added). *See also I.W. Berman Properties v. Porter Bros., Inc.*, 344 A.2d 65, 71 (Md. 1975), *citing, Bargale Indus. v. Robert Realty Co.*, 343 A.2d 529, 535 (Md. 1975); *Leisner v. Finnerty*, 250 A.2d 611 (Md. 1969); *Hudson v. Md. State Hous. Co.*, 114 A.2d 421 (Md. 1955); *Baltimore Academy of the Visitation v. Schapiro*, 181 A. 731 (Md. 1935). *See also* 6 A. CORBIN, *Contracts* § 1297, et seq. (1962).

The party asserting a novation or modification has the burden of proving *every element* of either a modification or novation, including the intent of the parties to extinguish the original contract. *Dahl v. Brunswick Corp.*, 356 A.2d 221, 227 (Md. 1976). In *Dahl*, the Court of Appeals stated: "A novation is never presumed; *the party asserting it* must establish clearly and satisfactorily that there was an intention, concurred in by all the parties, that the existing obligation be discharged by the new obligation." [citations omitted]" *Id.* (emphasis added); *I.W. Berman*, 344 A.2d at 70, *citing, Adler v. Walker & Dunlop, Inc.*, 225 A.2d 459, 462 (Md. 1967) ("For a novation to exist there must be evidence of an agreement among the parties to extinguish the old obligation[s] and substitute a new on for it."). A party asserting a modification also has the burden of proving the parties intended to modify the contract as asserted. *L&L Corp. v. Ammendale*, 236 A.2d 734, 737 (Md. 1967); *Vincent v. Palmer*, 19 A.2d 183, 188 (Md. 1941); *Keco Indus. v. ACF Indus.*, 316 F.2d 513, 516 (4th Cir. 1963), *citing, Vincent v. Palmer, supra* ("[M]utual assent is as much a requisite element in effecting a contractual modification as it is in the initial creation of a contract").

It is a material question of fact whether the parties intended a novation or modification because the Kileys' undisputed affidavits in the record provide undisputed facts that negate such a conclusion as to the parties' intent. Accordingly, the Court of Special Appeals erred in making this factual determination *sua sponte* as a matter of law and in disregarding the actual reasons given for granting the summary judgment motion by the circuit court. The Court of Special Appeals could not make that determination as a matter of law because the Bank never asserted it and there was no evidence in the record that the parties intended to extinguish the old contract. *See Wright v. Commercial & Sav. Bank*, 464 A.2d 1080, 1085 (Md. 1983) (Finding the court's opinion "was gratuitous because the court answered a question that was not properly before it since" the party asserting it failed to allege facts

sufficient to raise the issue.)

The relationship of bank and depositor is that of debtor and creditor, founded on contract. *Bank of Marin v. England*, 385 U.S. 99, at 100 (1966). "Implicit in the contract is the duty of the bank to use ordinary care in disbursing the depositor's funds. *Commonwealth Bank v. Goodman*, 97 A. 1005 (Md. 1916). The duty cannot be abrogated by agreement." *Bank of S. Md. v. Robertson's Crab House, Inc.*, 389 A.2d 388 (Md. App. 1978) (where bank is negligent as a matter of law, it cannot claim customer was negligent). "[I]n the case of bankers, where greater confidence is asked and reposed, and where dishonest dealings may cause widespread disaster, a *more rigid responsibility for good faith and honest dealing will be enforced* than in the case of merchants and other traders." *St. Louis & S.F. Ry. Co. v. Johnston*, 133 U.S. 566, 577 (1890) (emphasis added).

The right of the depositor is to have this debt repaid in whole or in part by honoring his checks drawn against the deposits. 5A MICHIE BANKS AND BANKING, Ch. 9 § 1. "[The bank] is bound by an implied contract to repay the same on his demand or order." *Id.* "A bank cannot question the right of its customer to withdraw funds, nor refuse to honor his demands by check" *Duckett v. National Mechanics' Bank*, 38 A. 983 (Md. 1897), *citing*, *Bank v. Dodge*, 124 U.S. 333 (1895) ("[The depositor] brought suit against the bank, and based his claim to recover on the distinct ground that *the bank had actual notice from its own books as to what funds [the depositor] had on deposit, and had actual notice [of those funds] and was bound to honor the checks as they were drawn against funds which had actually been deposited.*").

The Opinion cites 5(A) MICHIE ON BANKS AND BANKING Ch. 9, § 232, at 903-08, where it is stated that a bank may refuse to pay its customer's checks if there are "insufficient funds in the customer's account," (*Id.*) for the proposition that the Bank was "justified" in dishonoring the Kileys' checks because of the alleged insufficiency of funds in the Kileys account. It reaches this conclusion by adopting wholesale the Bank's argument that the hold on the Kileys' funds[21] effectively caused the account to be without funds. —

The rights and duties of the parties, however, must be determined by the actual status of the account. *First Nat'l Bank v. Whitman*, 94 U.S. 343 (1877); *In re Ruskay*, 5 F.2d 143, 147 (2d Cir. 1925) (same); *Rosenthal v. Citizens Bank of Cortez*, 266 P.2d 767 (Colo. 1963) (the actual status of the bank account determines the rights and liabilities of the parties); 5(A) MICHIE ON BANKS AND BANKING, Ch. 9, § 311, at 373; 10 AM. JUR. 2D. *Banks* § 571, at 542-43 (1963 & Supp. 1994) ("The obligation of a bank to pay a

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[21] As a defense to the wrongful dishonor of the Kiley's checks and the libel and slander of the Kileys, the Bank asserted: "Thus, as of April 29, 1992, the Kileys *effectively* had a zero balance in the account." This is directly refuted by the Bank's statement of account and violates the rule that the actual status of the accounts determines the rights and liabilities of the parties.

check drawn upon it, or its right to refuse payment thereof, *depends upon the actual state of the drawer's account at the time of its presentment...*") (emphasis added).

A bank may not, by simply placing a hold on its customers account, refuse to honor its customer's checks while it has sufficient funds of its depositor in the account. 5(A) MICHIE ON BANKS AND BANKING, Ch. 9, § 9, at 55, n. 80; *Aachen & Munich Fire Ins. Co. v. Guaranty Trust Co.*, 39 F.2d 578 (2d Cir. 1930). In *Aachen*, the court stated: "Transactions of this kind do not give rise to a fair inference that the ... plaintiff agreed to have its status as a depositor finally cease pro tanto upon the making of a mere book-keeping entry. ...Here the bank parted with money and did no other thing which altered its position. There can be no rule of law that the mere book-keeping entry in itself constitutes payment." *Id.*, 39 F.2d at 581. Accordingly, the Court of Special Appeals erred as a matter of law in concluding as a matter of disputed fact that there was insufficient funds in the Kileys' account when the Bank dishonored the checks. *See Crout v. South Carolina Nat'l Bank*, 258 S.E.2d 924 (S.C. 1979). A reasonable jury could find otherwise.

Finally, the Court of Special Appeals' Opinion emasculates the notice requirements of the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693, et seq. (1988 & Supp. 1992), and 12 C.F.R. § 205.8(a) (1995), and the Expedited Funds Availability Act ("EFAA"), 12 U.S.C. § 4001, et seq. (1988 & Supp. 1992), and 12 C.F.R. § 229.18(e) (1995). The legislative history of the EFTA shows that Congress' specific intent in enacting the EFTA was to provide a "framework of rights, responsibilities, and liabilities for participants in EFT systems, *but its principal purpose* was "the creation of substantive consumer rights."[22] "When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances." *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

Under the EFTA, the Bank was required to provide 21 days notice prior to making *any* changes which "*would result in*...limitations on the frequency or dollar amounts of transfers." 12 C.F.R. § 205.8(a) (1995). Under the EFAA, First National was required to provide 30 days notice of any changes that affect the availability of funds. 12 C.F.R. § 229.18(e) (1995). The court erred in concluding the notice requirements of the EFAA and the EFTA are inapplicable when a bank closes its customer's account, because the notice requirements of the regulations apply to the Kileys' checking account under the plain wording of the Acts and regulations. The Act applies to any actions not specifically excepted,[23] including closing a consumer account without any

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[22] It is important to preserve the object and policy of the entire statute. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986).

[23] *Local Union No. 626, Bhd. of Carpenters v. Delaware Contractors Ass'n*, 344 F. Supp. 1281, 1285 n.12 (D. Del. 1972), aff'd, 477 F.2d 564 (3d Cir. 1973) ("The legislative history is

just cause whatsoever. By enacting a general requirement to provide a minimum of 21 days notice of *any changes* affecting the ability or rights of consumers to effectuate electronic transfers from their accounts and then setting forth specific exceptions, Congress impliedly prohibited closing an account subject to electronic transfers on less than 21 days notice. The Bank acknowledged in its briefs that the EFTA requires "*at least 21 days* [notice] "before the effective date of *any change that would result in*...fewer types of available electronic fund transfers or stricter limits on the frequency...of transfers" but denied it applies in the case sub judice. The Bank's argument turns on the inference that when Congress used the crucial term "any changes that would result in" in enacting the EFTA, it could not have intended for this phraseology to apply when a bank closes a consumer checking account even though the account is subject to electronic transfers.[24] The Bank's interpretation of the Act would thwart Congress' intent. The practical consequence of interpreting the acts in the way the Bank suggests would necessarily be to allow banks to close consumer checking accounts on shorter notice rather than provide the required notice. The legislative history confirms that Congress indeed intended, as the Act literally provides, that any changes that would result in an inability to effectuate electronic transfers requires a minimum 21 days advance notice.

Clearly, closing the Kileys' account is a material change that would, *and did in fact, result in* fewer types of available electronic fund transfers (the Bank rejected Mr. Kiley's direct deposit paycheck) and a stricter limit on the frequency of the Kileys' transfers (the Bank eliminated the Kileys' ability to make any electronic transfers from the account). It is undisputed that closing the Kileys' account *resulted in* a limitation on the ability of the Kileys to effect electronic transfers; and that the Bank restricted the availability of the Kileys' deposits in violation of the Expedited Funds Availability Act by misleading the Kileys with regard to their deposits, and by failing to make the deposited paycheck of Mrs. Kiley available within the required time frame of the Act--as evidenced by their dishonor of the Kileys' mortgage payment six days after manually depositing Mrs. Kiley's direct deposit paycheck.

While it is true the Acts do not specifically discuss the closing of a consumer's checking account, the Bank's interpretation of the regulations in the courts below could defeat the intent of Congress in enacting the statutes; the Bank's interpretation would permit banks to merely close their customer's

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quite clear on this point. It states: 'By enacting a general prohibition ... and then setting forth specific exceptions, Congress impliedly prohibited any purpose not specifically excepted.' ")

[24] *Master Insulators of St. Louis v. Internat'l Assn. of Heat and Frost Insulators and Asbestos Workers, Local No. 1*, 925 F.2d 1118 (8th Cir. 1991) ("A statute should not be construed in such a manner as to render it partly ineffective or inefficient if another construction will make it effective")

accounts rather than provide the notice required by the regulations and would thereby thwart Congress' intended protections for consumers. The Bank's notice of its intent to close the account was inadequate as a matter of law, because the Bank failed to provide the notice required by either the EFTA or the EFAA. The Bank's interpretation of the law, as adopted by the Court of Special Appeals, should be reviewed by this Court.

CONCLUSION

The Maryland courts unfairly deprived the Kileys of their right to a jury trial by completely disregarding their undisputed evidence and the reasonable inferences to be drawn therefrom, by denying them a fair hearing in either court, and by denying them the equal protection of the law concerning the proper application of summary judgment, review of a summary judgment disposition, waiver, promissory estoppel, conversion, wrongful dishonor, libel, and slander. Both courts engaged in the forbidden practice of weighing the evidence, engaging in factfinding, and weighing the credibility of the witnesses' testimony in violation of the mandates of this Court and the Maryland Court of Appeals concerning summary judgment. The Maryland case law cited herein has been repeatedly applied to protect the Constitutional rights of other plaintiffs and other litigants to a jury trial and to due process of law. The Kileys were entitled to the equal protection of the well-established case law concerning the proper application of the summary judgment procedure and the other case law protecting their right to a jury trial where questions of promissory estoppel, waiver, motive and intent are material elements of the case. The Maryland courts' refusal to apply this established precedent to the Kileys' case deprived them of their constitutional right to the equal protection of the laws.

This petition for a writ of certiorari should be granted to protect the constitutional rights of pro se litigants to due process, the equal protection of the laws, and to a jury trial; to preserve Congress' intent in enacting the notice requirements of the EFTA and the EFAA by reviewing the Maryland Court of Special Appeals' statutory interpretation of these Acts, and to correct the Maryland courts' rejection of this Court's mandates concerning the rights of depositors to have their checks paid when the actual status of a depositor's account indicates sufficient funds are available to pay the checks.

Respectfully submitted.

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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1994

JAMES E. KILEY, JR. and MARY C. KILEY,
PETITIONERS

v.

FIRST NATIONAL BANK OF MARYLAND,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS OF MARYLAND

APPENDIX

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APPENDIX

U.S. CONST. Amend. VII

The Seventh Amendment to the United States Constitution, provides, in relevant part, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, ..."

U.S. CONST. Amend. XIV, § 2

The Fourteenth Amendment to the United States Constitution, provides, in relevant part, "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

MD. CONST. CODE ANN. § 23 (1981)

Article 23 of the Maryland Declaration of Rights provides, in relevant part, "The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five thousand dollars, shall be inviolably preserved."

MD. CONST. CODE ANN. § 24 (1981)

Article 24 of the Maryland Declaration of Rights provides, in relevant part, "That no man ought to be ... deprived of his life, liberty, or property, but by the judgment of his peers."

Notice Requirement of the ELECTRONIC FUNDS TRANSFER ACT, 15 U.S.C. § 1693, et seq., (1988 & Supp. 1992) Codified at 12 C.F.R. § 205.8(a), 205.7(a)(4) (1995)

* * * * *

§ 205.7 Initial disclosure of terms and conditions.

(a) *Content of disclosures.* At the time a consumer contracts for an electronic fund transfer service or before the first electronic fund transfer is made involving a consumer's account, a financial institution shall disclose to the consumer, in a readily understandable written statement that the consumer may retain, the following terms and conditions of the electronic fund transfer service, as applicable:

* * * * *

(4) The type of electronic fund transfers that the consumer may make and any limitations on the frequency and dollar amount of transfers. The details of the limitations need not be disclosed if their confidentiality is essential to maintain the security of the electronic fund transfer system.

* * * * *

§ 205.8 Change in terms; error resolution notice.

(a) *Change in terms.* A financial institution shall mail or deliver a written notice to the consumer at least 21 days , the before the effective date of any change in a term or condition required to be disclosed under § 205.7(a) if the change would result in increased fees or charges, increased liability for the consumer, fewer types of available electronic fund transfers, or stricter limitations on the frequency or dollar amounts of transfers. Prior notice need not be given where an immediate change in terms or conditions is necessary to maintain or restore the security of an electronic fund transfer system or account. However, if a change required to be disclosed under this paragraph is to be made permanent, the financial institution shall provide written notice of the change to the consumer on or with the next regularly scheduled periodic statement or within 30 days, unless disclosure would jeopardize the security of the system or account. However, if such a change is to be made permanent, the financial institution shall provide written notice of the change to the consumer on or with the next regularly scheduled periodic statement or within 30 days, unless disclosure would jeopardize the security of the system or account.

Notice Requirement of the
EXPEDITED FUNDS AVAILABILITY ACT,
12 U.S.C. § 4001 - § 4010, (1988 & Supp. 1993)
Codified at 12 C.F.R. § 229.18(e) (1995)

* * * * *

§ 229.18 Additional disclosure requirements.

* * * * *

(e) *Changes in policy.* A bank shall send a notice to holders of consumer accounts at least 30 days before implementing a change to the bank's availability policy regarding such accounts, except that a change that expedites the availability of funds may be disclosed not later than 30 days after implementation.

JAMES E. KILEY, JR. et ux.	*	In the
	*	Court of Appeals
v.	*	of Maryland
	*	Petition Docket No. 673, Sept. Term 1994
FIRST NATIONAL BANK OF MARYLAND	*	(No. 137, Sept. Term 1994, Court of Special Appeals)

* * * * * * * *

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY
Chief Judge

Date: April 12, 1995

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 137

SEPTEMBER TERM, 1994

JAMES E. KILEY, JR. ET UX.

FIRST NATIONAL BANK OF MARYLAND

Garrity*,
Alpert,
Hollander,
JJ.

Opinion by Hollander, J.

Filed: November 30, 1994

*Judge Garrity participated in the argument and decision in this case but retired from the Court prior to the filing of the Opinion.

#93721

[The actual page breaks of the opinion are indicated by "*[pagenum]" in bold.]

Appellants, James and Mary Kiley, sued appellee, First National Bank of Maryland (the "Bank"), in a multi-count complaint filed in the Circuit Court for Montgomery County. The Kileys sought compensatory and punitive damages stemming from the Bank's alleged breach of contract and tortious misconduct. The gravamen of appellants' various causes of action centers on their contentions that the Bank improperly attempted to impose service charges with respect to the Kileys' checking account, unilaterally sought to alter the terms applicable to their checking account, and wrongfully closed their checking account.

The Kileys requested over 25 million dollars in punitive and compensatory damages. They sought recovery, inter alia, for the following: lost interest on their checking account for the duration of their expected lifetimes; the anticipated losses due to the minimum balance requirements and service charges; emotional distress; and injury to their reputation and credit. The parties filed cross motions for summary judgment; this appeal followed the entry of summary judgment in favor of the Bank. Finding no error, we shall affirm.

The Kileys present two compound questions for consideration:

> I. Whether the lower court erred in granting summary judgment in favor of First National when there are material questions of fact unresolved; e.g., whether the bank is estopped from denying the terms of its contract, whether the bank waived closing the checking account, whether the bank had sufficient funds on deposit from which it could have paid two checks when it dishonored them, and whether the bank wrongfully deposited a direct deposit paycheck

and refused access to the deposits even after a formal demand.

*2 II. Whether the lower court erred in failing to grant the Kileys' request for summary judgment on the tort claims, when the evidence regarding these claims was undisputed and appellants' arguments were unrebutted.

Maryland Rule 2-501 permits the entry of summary judgment where "there is no genuine dispute as to any material fact, and the party is entitled to judgment as a matter of law." In resolving a motion for summary judgment, it is not for the trial judge to decide disputed facts. Moreover, in determining whether there are any material facts in dispute, the trial court must resolve all inferences in the light most favorable to the party opposing the motion. Any inferences drawn by the trial court must be reasonable ones. *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 739 (1993); *Clea v. City of Baltimore*, 312 Md. 662, 678 (1988).

When a motion for summary judgment is filed, the opposing party may not simply claim that there are facts in dispute. In order to controvert such a motion, "the opposing party must proffer material facts which would be admissible in evidence." *Seaboard surety Co. v. Richard F. Kline, Inc.*, 91 Md. App. 236, 243 (1992). Mere conclusory denials or allegations will not suffice. Id. As the Court stated in *Beatty*, "[T]he mere existence of a scintilla of evidence in support of the plaintiff's claim is insufficient to preclude the grant of summary judgment. . . ." *Beatty*, 330 Md. at 738.

In our view, the trial court correctly granted the Bank's Motion for

Summary Judgment and properly denied the Kileys' *3 Motion for Summary Judgment. Our analysis follows.

FACTUAL SUMMARY

The facts are largely undisputed. In July, 1986, the Bank acquired all checking and savings accounts held by the now-defunct Baltimore Federal Financial ("BFF") at the Montgomery Mall branch. The Kileys were not married at that time, and only Mr. Kiley had an account with BFF at that branch.

Mr. Kiley's BFF account had several features that were understandably important to him: it was interest-bearing; it had no minimum balance requirement; and BFF did not charge service fees. As part of the acquisition of BFF, the Bank maintained those features.

Central to the Kileys' claim is the Bank's letter to its customers in June, 1986, which stated: "We're excited about having you as a new First National customer and want to assure you that any changes to your accounts will be to your benefit." Further, in his deposition, Mr. Kiley testified that the Bank's branch manager promised him "that if (he) left (his) account open with First National Bank of Maryland, no changes would be made to the terms and conditions of the account."[1] Mr. Kiley acknowledged in his deposition that the branch manager never expressly promised that the benefits would remain the same. He

[1] Although Mr. Kiley could not remember either the sex or name of the

branch manager, he was confident that he accurately remembered the content of the discussion. No issue has been raised by the Bank as to the manager's agency status or authority.

*4 claimed, however, that the assurance was certainly "implied."

In October, 1990, the Bank attempted to change Mr. Kiley's account from an "Investment Checking" account to a "Bonus Checking" account, and sought to impose a $15.00 monthly service fee if the account fell below a minimum balance requirement. Unhappy with that proposal, Mr. Kiley met with another Bank employee and argued to her that the imposition of a fee would constitute a breach of contract. When the Bank reversed the charge and reinstated the original BFF terms, Mr. Kiley was at least temporarily appeased.

In August, 1991, after the Kileys married, Ms. Kiley was added as a party to Mr. Kiley's Bank account. At that time, the Kileys executed signature cards that advised them to "See Important Information in Rules and Regulations Governing Personal Deposit Accounts." The reverse side of each signature card also stated: "The applicant(s), whose signature(s) appears below, hereby acknowledges receipt of the Demand Deposit Disclosure Statement and the Rules and Regulations Governing Personal Deposit Accounts."

Another letter was sent on December 31, 1991 to the Bank's former BFF customers, including Mr. Kiley, notifying them of the Bank's intention to implement changes to the terms of their accounts. The letter advised that, as

former BFF customers, their accounts differed from those of other Bank customers and, because of rising business costs, it was necessary to change the pricing of some services, as well as the types of accounts *5 offered.[2] To Mr. Kiley's dismay, none of the proposed types of accounts included an interest-bearing, no minimum balance, no service fee program, such as Mr. Kiley had enjoyed. As a result, Mr. Kiley refused to accept the proposed changes, and demanded that the Bank continue the Kileys' account on the identical terms.

On February 1, 1992, the Bank implemented the minimum balance requirements and service fees outlined in its letter. The Kileys again objected to the changes in their account. When the Bank and the Kileys were unable to reach a mutually satisfactory resolution, the Bank advised the Kileys of their option to close their account. On April 15, 1992, after unsuccessful attempts to resolve the dispute, the Bank requested the Kileys to close their account. The Bank's letter stated:

> [W]e now would like you to close your account with First National Bank of Maryland by April 24, 1992. If you do not close your account by that date, we will close your account and mail you a cashier's check for the remaining balance. Please be advised not to write any more checks or they will be returned "Account Closed."

Although the Kileys acknowledged receipt of the notice, they made no attempt to close the account or to open a new one elsewhere. Nor did they ask their employers to stop direct deposits to their bank account. Moreover, notwithstanding the

[2] In the notice, the Bank offered an interest-bearing, no service-fee option that required a minimum balance of $1,000. It also offered a non-interest-bearing personal checking account with no service charges, with a required minimum daily balance of $600.00.

*6 Bank's notice, they continued to write checks drawn on their account.

On April 29, 1992, the Bank mailed a check to the Kileys in the amount of $1,121.07, representing their remaining balance. The Bank also notified them that the account had been closed. Following issuance of the check on April 29, 1992, the Bank placed a hold on the Kileys' account in order to afford them an opportunity to cash the check. The Bank rejected Mr. Kiley's direct deposit from his employer on April 30, 1992. On May 4, 1992, however, Ms. Kiley's electronic deposit in the amount of $877.06 was inadvertently accepted and credited to the Kileys' account.

From April 30, 1992 until May 8, 1992, the Bank paid two checks written by appellants. One check, in the amount of $636.36, was paid to a creditor on April 30, 1992; the other, in the sum of $40.00[3], was paid on May 5, 1992, out of the reserved money. But the Kileys' mortgage check in the amount of $1,111.87, written on April 30, 1992, was rejected because, after deducting the funds on hold, the check exceeded the remaining balance in the Kileys' account. On or about May 15, 1992, eight days after the Kileys cashed the Bank check for $1,121.07, the Bank sent another draft to the Kileys for $198.46, representing the remaining funds in the account, plus a refund for a $2.00 service fee. The Bank actually closed the account on May 18,

[3] The $40.00 check, written to the Kileys' housekeeper, was initially dishonored. That check was resubmitted and honored after Ms. Kiley's direct deposit was credited to the account.

*7 1992, when the second cashier's check was presented for payment.

DISCUSSION

I. The Operative Contract

To support their claims as to breach of contract, promissory estoppel, and waiver, the Kileys rely, primarily, on the Bank's conduct prior to the time that Ms. Kiley was added to the account. We conclude that, when Ms. Kiley joined the account, all of the parties agreed to specific contractual terms that superseded any other contract terms. Further, the Bank never breached the operative contract terms. Our holding renders irrelevant the Bank's conduct prior to August, 1991 with respect to these particular claims. We explain.

The Kileys' relationship with the Bank was contractual in nature. *See Gordon, Feinblatt, Rothman, Hoffberger & Hollander v. Gerhold*, 90 Md. App. 360, 376 (1992)[4] ("A bank and its customers enjoy a debtor/creditor relationship in which the rights and liabilities of each are contractual."). As the Court said in *University Nat'l Bank v. Wolfe*, 279 Md. 512, 514 (1977), "(t)he relationship (between a bank and its customer], which has been universally recognized, and consistently followed in this State to the present time, is that of debtor and creditor, with the rights between the parties considered as contractual, and derived by implication from the banking relationship unless

[4] The Hollander in the referenced case is not a relative of the author.

*8 modified by the parties." (Citation omitted).

After the Kileys married in August, 1991, they executed new signature cards with the Bank. A signature card may constitute a contract between a bank and its customer. *Fleming v. Bank of Va.*, 343 S.E.2d 341, 344 (Va. 1986) ("The signature card constituted the contract between the parties and, subject to the statutory schemes, regulates their rights and duties."); *Fed. Deposit Ins. Corp. v. West*, 260 S.E.2d 89, 91 (Ga. 1979) ("(T)he signature card and the checks drawn against the account are the contract documents between the bank and the customer."); *Chickerneo v. Soc'y Nat'l Bank of Cleveland*, 390 N.E.2d 1183, 1185 (Ohio 1979). In this case, the signature cards specifically referred to the Bank's Rules and Regulations and, in executing the signature cards, appellants accepted those Rules and Regulations. *Dietrich v. Chem. Bank*, 454 N.Y.S.2d, 490, 491 (Sup. Ct. 1981), aff'd, 459 N.Y.S.2d 1016 (App. Div. 1983) (plaintiff may not claim she did not receive Bank's rules and regulations because she signed signature card acknowledging receipt). Collectively, the signature cards and the Rules and Regulations constituted the contract between the Bank and the Kileys. See 5(a) MICHIE ON BANKS & BANKING, Ch. 9, S 1, at 30 (1994 Repl. Vol.) ("Michie") ("A 'signature card' is a contract which creates a savings account or checking account . . . Assuming, arguendo, that Mr. Kiley ever had a contract

with the Bank to maintain, perpetually, the original BFF terms, once Ms. Kiley was added to the account, the Kileys either created a new *9 contract with the Bank or modified their original contract.

In *Dahl v. Brunswick Corp.*, 277 Md. 471 (1976), the Court set forth the elements or novation. It said:

> "A 'novation' is a new contractual relation made with intent to extinguish a contract already in existence. It 'contains four essential requisites: (1) a previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the validity of such new contract, and (4) the extinguishment of the old contract, by the substitution of the new one.'"

Id. at 481 (*quoting I.W. Berman Properties v. Porter Bros., Inc.*, 276 Md. 1, 7 (1975); citations omitted).

Whether the parties here entered into a novation or simply modified the original contract, they nonetheless agreed to be bound by the Bank's Rules and Regulations. Accordingly, whatever the Bank may have done prior to August, 1991 would have no legal significance. Moreover, the bank's conduct after that point in time must be considered in light of the operative contract terms. We are of the view that the Bank's actions after Ms. Kiley joined the account complied with the Rules and Regulations.

The Rules and Regulations provide, in pertinent part, as follows:

> General Information
>
> 1. Welcome to the First National Bank of Maryland This Agreement has been prepared to explain the terms and conditions of the deposit account(s) you have opened with The First National Bank of Maryland (Bank).

The Rules and Regulations set forth in this Agreement, together with any deposit agreements, funds availability statements, policies of the Bank set forth in the Branch Operations Manual, schedules of service charges, and brochure material describing deposit accounts (collectively *10 The "Rules and Regulations"), govern all deposit accounts offered by the Bank. *You, as a deposit customer, and the Bank agree to abide by the Rules and Regulations outlined in these various materials . .*

* * * *

4. Deposits to Accounts

Section A - General Deposit Rules

In receiving items for deposit or collection, we act as your collecting agent and assume no responsibility beyond the exercise of due care. *For good reason, we can refuse, limit, or return any deposit.*

* * * *

7. Service Charges

We may charge you for the various services provided in connection with your accounts. *These prices . . . may be changed from time to time, at our option, upon reasonable notice.*

* * * *

11. Closing the Account

You or the Bank can close an account in compliance with whatever restrictions on length of deposit or notice of withdrawal might be imposed by Federal Regulations or by the practice of the Bank for that account.

* * * *

Savings and Money Market Deposit Accounts

(2) Payment of Interest

Interest payments, if not withdrawn, will bear interest the same as a deposit of cash. All interest rates applicable to deposit accounts are annual interest rates unless otherwise specified. *Interest on interest-bearing checking*, savings and money market accounts is calculated and accrued daily and credited monthly at the end of the monthly cycle, if the account remains open through the last day of the monthly cycle. Accounts closed between interest payment periods will not receive interest for the partial period. *We may establish a minimum balance or a minimum average balance for your account, below which a lower interest rate or no interest will be accrued or credited, or below which interest will be credited only at maturity.*

(Emphasis added [by the Court of Special Appeals]).

*11 Although the Bank's regulations did not address the process of closing an

account, common law dictates that principles of good faith apply. Nevertheless, the relationship between a bank and its customer ordinarily exists "at will" and may be terminated by either party at any time. *See, e.g., Groos Nat'l Bank v. Comptroller of Currency*, 573 F.2d 889, 897 (5th Cir. 1978) ("It is well established at common law that a bank may decline or terminate a deposit relationship"); *Elliot v. Capital City State Bank*, 103 N.W. 777, 778 (Iowa 1905) (a bank "may receive a general deposit to-day, and to-morrow, for reasons of its own, it may return the amount deposited, and refuse absolutely to transact business further with such depositor."); *Chicago Marine & Fire Ins. Co. v. Stanford*, 28 Ill. 168, 173 (1862) ("If the banker finds the depositor a troublesome customer, so that the account is not a desirable one, he may tender the full amount of the deposit, and refuse to receive more, and thus close the account. . . ."). See also, 5(A) MICHIE, Ch. 9, S 9 at 55 ("(T)he relationship of banker and depositor may be terminated by the act of either or both parties.").

When the Bank proposed to change the terms of the Kileys' account, it acted in accordance with its contractual obligations. Similarly, when the Bank gave notice to close the account, it complied with the contractual terms. Any claim to the contrary must fail.

*12 II. Sufficiency of Notice to Close the Account

The Kileys contend that the Bank's notice to close was legally insufficient. The law is well settled that a bank must give reasonable notice to

a customer of its intent to terminate a bank account. *Ambruster v. Nat'l Bank of Westfield*, 182 A. 613 (N.J. 1935) ("A bank is not required to keep a customer's account, but it may close out an account only on reasonable notice."); 5(a) MICHIE, Ch. 9, S 9 at 55 ("It is well settled that a bank is not justified in closing an account without reasonable notice."). This means that a bank must give enough notice to allow a customer to protect his or her credit by making other banking arrangements. *See C-K Enterprises v. Depositors Trust Co.*, 438 A.2d 262, 265 (Me. 1981) ("(R]easonable notice is such notice as would allow a customer a reasonable opportunity to protect his or her credit . . . ."); *Jaselli v. Riggs Nat'l Bank*, 36 App. Cas. 159, 169 (App. D.C. 1911) ("It is well settled that a bank is not justified in closing an account and dishonoring checks drawn against it without reasonable notice. The reason is obvious. The depositor is entitled to sufficient notice to enable him, in the exercise of reasonable diligence, to protect his credit.").

We observe that the Bank clearly did not furnish much notice to the Kileys to allow them to protect their credit. But we need not reach the issue of whether the notice was legally insufficient because, to the extent that the Kileys sustained injury, it was self-inflicted. The undisputed facts demonstrate *13 that the Bank informed the Kileys on April 15, 1992 that they were to close their account by April 24, 1992. The Bank also advised appellants that, if they did not close their account by that date, the Bank would close it and mail a cashier's check to them for the remaining balance. The Bank expressly

warned the Kileys not to write any more checks on the account. The Kileys never asked the Bank for additional time to make other banking arrangements, and wholly failed to make any effort to establish a new account elsewhere or to inform their employers to terminate direct deposit. At their peril, they ignored the Bank and refused by their actions to stop writing checks or to assume any responsibility to protect their own credit.

The Bank dishonored a mortgage check written on April 30, 1994, fifteen days after the Bank gave notice and after the Kileys had received a check from the Bank representing their balance in the account. If the dishonored check had been written by the Kileys before, on, or immediately after April 15, 1992 --the date the Bank sent notice -- and if it had been presented by the payee after the scheduled closing date, we would confront an entirely different situation. But here, the Kileys voluntarily elected to write checks when they had been informed not to do so. They erroneously argue that the consequences of these actions are the Bank's fault.

The Kileys also argue that, based on the Bank's actions after it gave notice of termination, it waived any right it had to close their account. They rely on the following facts: The *14 Bank placed a hold on the remaining funds; it mistakenly accepted the direct deposit of Ms. Kiley's paycheck; it paid the Kileys' subsequent drafts. In order to show waiver, however, there must be evidence of an intentional relinquishment of a known right. *Dahl v. Brunswick Corp.*, 277 Md. at 486; *Canaras*, 272 Md. at 360. It is apparent

that the Bank placed a hold on the Kileys' funds as part of the process of closing their account. Although the Bank erroneously accepted one direct deposit, the Kileys actually wanted the Bank to pay the checks they had written after they received notice of the intended closure. Even in summary judgment posture, the Bank's action could not reasonably amount to waiver, and we perceive no error.

III. The Kileys' Contract Contentions

As we have observed, much of the Bank's conduct on which appellants rely preceded the time when Ms. Kiley was added to the account. But even if the Bank's conduct prior to August, 1991 is relevant to the Kileys' contract-related claims, those claims cannot prevail.

Appellants claim that when the Bank acquired Mr. Kiley's BFF account in 1986, the Bank's letter to its prospective customers, as well as the statements of its employees, created an enforceable contract. The Kileys contend that the terms of the contract entitled them to a lifetime interest-bearing, no minimum-balance, no-service-fee checking account with the Bank. They further assert that, at the time the Bank acquired Mr. *15 Kiley's BFF account, he relied on the Bank's representations and did not establish an account with another bank.

To support their contract claim, the Kileys rely on Md. Fin. Inst. Code Ann., § 5-807(a) (1) (1992); it proscribes false or deceptive advertising and misrepresentations by a bank.[5] Because the Bank is barred by law from

making misrepresentations, it follows, the Kileys say, that the Bank must have meant what it said in its letter and through its employees.

The Kileys also argue that the Bank breached its contract by varying the terms of the account. Based on the doctrine of promissory estoppel, they further claim that the Bank was precluded from altering the contract terms. Alternatively, the Kileys argue that the Bank waived any rights it may have had to alter the contract because it ratified the terms in 1990.

The Kileys' contentions regarding creation of the contract, misrepresentation, breach of contract, promissory estoppel, and waiver are all without merit. We shall consider these claims in turn.

A contract is defined as "a promise or set of promises for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Richard A. Lord, 1 *WILLISTON ON CONTRACTS* § 1:1, at 2-3 (4th ed. 1990) (hereinafter "*Williston*"). *Accord, Restatement (Second) Contracts* § 1, at 5 (1981). Mutual assent is an integral

[5] The statute provides, in pertinent part: "A banking institution may not . . . (I)ssue an advertisement or make a representation that is false, misleading, or deceptive . . . .

*16 component of every contract. *Md. Supreme Corp. v. Blake Co.*, 279 Md. 531, 539 (1977).

It is equally well established that an enforceable contract must express with definiteness and certainty the nature and extent of the parties' obligations.

Canaras v. Lift Truck Services, 272 Md. 337, 346 (1974); *Robinson v. Gardiner*, 196 Md. 213, 217 (1950); *Reiser Co. v. Baltimore Radio Show, Inc.*, 169 Md. 306, 312 (1935). If the contract omits a term or is too vague with respect to essential terms, the contract may be invalid. *L&L Corp. v. Ammendale*, 248 Md. 380, 385 (1967); *see also, Schloss v. Davis*, 213 Md. 119, 123 (1956) (a "contract may be so vague and uncertain as to price or amount as to be unenforceable."). "Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract." Joseph M. Perillo, 1 *Corbin on Contracts* § 4.1, at 525 (rev. ed. 1993) (hereinafter "*Corbin*"); *See also, Restatement (Second) Contracts, supra*, § 33(1), at 92 ("Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.").

In *Robinson v. Gardiner*, 196 Md. 213 (1950), the Court explained the requirement of contractual certainty.

> Of course, no action will lie upon a contract, whether written or verbal, where such a contract is vague or uncertain in its essential terms. The parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean. If the *17 agreement be so vague and indefinite that it is not possible to collect from it the intention of the parties, it is void because neither the court nor jury could make a contract for the parties. Such a contract cannot be enforced in equity nor sued upon in law. For a contract to be legally enforceable, its language must not only be sufficiently definite to clearly inform the parties to it of what they may be called upon by its terms to do, but also must be sufficiently clear and definite in order that the courts, which may be

required to enforce it, may be able to know the purpose and intention of the parties.

Id. at 217 (citations omitted).

The Bank's letter, on which appellants rely, obviously does not contain any terms. We find it quite a stretch to construe that letter as a contract. At most, it is a mere expression of intent to do an act. "(A) mere expression of intention to do an act is not an offer to do it, and a general willingness to do something on the happening of a particular event or in return for something to be received does not amount to an offer." *Blake Co.*, 279 Md. at 539.

As *Corbin* has recognized, it is certainly possible to make a binding offer through a newspaper advertisement, a catalog, a placard circular, a handbill, or the like. But "(s)uch advertisements are understood to be mere requests to consider and examine and negotiate; and no one can reasonably regard them otherwise unless the circumstances are exceptional and the words used are very plain and clear." 1 *Corbin*, § 2.4, at 116-17. Ordinarily, such communications are considered "mere preliminary invitation(s)," 1 *Corbin*, § 2.4, at 122, or "inoperative step(s) in-the preliminary negotiation." 1 *Corbin*, § 2.2, at 105. Courts have understandably been reluctant to find an offer on the *18 basis of such preliminary communications. The Bank's letter was obviously incomplete as to material terms. In the same way, Mr. Kiley has admitted that the branch manager never expressly promised anything. Based on these undisputed facts, it is difficult to transform the Bank's letter or the

employee's statements into a contract.

Even assuming that the Bank's letter or the alleged statements of its employees created contractual rights, the putative contract is obviously silent as to its duration. Depending upon the intention of the parties, a contract, silent as to duration, may contemplate perpetual performance, performance for a reasonable time, or performance until the parties decide otherwise. But *Williston* and the *Restatement (Second) of Contracts* agree that, unless expressly provided, promises ordinarily are not interpreted to require perpetual performance. *Williston*, § 4:19, at 431; *Restatement (Second) Contracts*, § 33, Comment d, at 94. When courts are required to interpret such imprecise contracts, "some period short of infinity" is usually enforced. *Williston*, § 4:19, at 434. "[A]bsent a contrary intention being shown by the circumstances, (courts will) interpret a promise which does not in terms state the time of performance as intending performance in or for a reasonable time." *Id.* Similarly, if a continuing performance was anticipated, but no specific time provision was stipulated in the contract, "the contract contemplates performance for a reasonable time," and is usually terminable at any time by either *19 party. *Id.*, § 4:19 at 442; *Restatement (2d) Contracts*, § 33.

To the extent that the parties here formed a contract, silent as to duration, it would have been effective for a reasonable time. *Anne Arundel Co. v. Crofton Corp.*, 286 Md. 666, 673 (1980) ("In the absence of an express time for performance, a reasonable time will be implied."); *Williston*, § 4:19, at 429-48.

That is the only sensible and fair result. The Bank continued the BFF terms for over five years; such a lengthy period was certainly reasonable.

In applying the objective test to interpret a contract, the Court of Appeals has said: "'The true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.'" *Cloverland Farms Dairy, Inc. v. Fry*, 322 Md. 367, 373 (1991) (*quoting Kasten Constr. v. Rod Enterprises*, 268 Md. 318, 329 (1973)). We also find pertinent here the Court's analysis in *Canaras v. Lift Truck Services*: "Where language of a contract is open to an interpretation which is reasonable and in accordance with the general purpose of the parties, the hardship of a different interpretation is strong ground for belief that such a meaning was not intended." 272 Md. at 357 (*quoting Sorensen v. J.H. Lawrence Co.*, 197 Md. 331, 339 (1951)). In *Canaras*, the Court determined that it was unreasonable to interpret an agreement to hold that the parties intended an employer-employee relationship for a six year term. Instead, the Court concluded that the interpretation of a one *20 year term was more reasonable. Id.

The Kileys' estoppel argument is equally unavailing, and was properly rejected by the trial court. At his deposition, Mr. Kiley testified that "(he) would have closed the account, but for the promise to (him) that if (he) didn't close the account, (his) account would continue with the same terms that (he) had with BFF."

It is unclear whether Maryland continues to adhere to the more stringent formulation of promissory estoppel, as set forth in the original Restatement of Contracts, or now follows the more flexible view found in the *Restatement (Second) Contracts*. *See Union Trust Co. of Md. v. Charter Medical Corp.*, 663 F. Supp. 175, 178 n.4 (D. Md. 1986) *aff'd w/o opinion*, 823 F.2d 548 (4th Cir. 1987). Neither view will change our course.

Section 90 of the original *Restatement* explains promissory estoppel as follows:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Section 90(1) of the *Restatement (Second) Contracts* defines the doctrine of promissory estoppel as follows:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Under either analysis, the promisor is estopped if, at the time of making the promise, he or she should have foreseen *21 reliance, and the enforcement of the promise is necessary to prevent injustice. *See Md. Nat'l Bank v. United Jewish Appeal Federation, Inc.*, 286 Md. 274, 282-284 (1979) (interpreting original *Restatement* only); 5 *Williston*, § 8:5, at 71-117. Given that the Kileys had the benefit of the

BFF terms for same five years, justice certainly does not compel application of promissory estoppel.

Even if the Bank made the promises as alleged, to succeed on a promissory estoppel claim, the Kileys had to proffer or show that the Bank anticipated that the Kileys would rely on the promise, that their reliance was reasonable, that they engaged in acts unequivocally referable to the promise, and that they suffered substantial injury as a result. *Snyder v. Snyder*, 79 Md. App. 448, 459, *cert. denied*, 317 Md. 511 (1989). Any claimed reliance that the Kileys may have had on the alleged promise to maintain forever the original terms of the account would have been unreasonable. *See G&M Oil Co. v. Glenfed Financial Corp.*, 782 F. Supp. 1085, 1090-91 (D.Md. 1991) (applying Maryland law, recovery denied on promissory estoppel grounds because no reasonable jury could have found reasonable reliance); *Charter Medical Group*, 663 F. Supp. at 179. Further, in order to establish that they relied to their detriment, the Kileys would have had to show that they lost an opportunity to secure the desired banking terms, perpetually, from another institution. They never claimed that they lost such an opportunity. They claimed only that Mr. Kiley could have taken his business *22 elsewhere.

The Kileys' argument that the Bank waived any rights it had to change the terms of the contract when it supposedly "ratified" the existing terms in 1990 is also without merit. In *Dahl v. Brunswick Corp.*, 277

Md. 471 (1976), the Court explained the concept of waiver:

> "A waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances. '[A]cts relied upon as constituting a waiver of the provisions' of a contract must be inconsistent with an intention to insist upon enforcing such provisions."

Id. at 486, (*quoting BarGale Industries v. Robert Realty Co., Inc.*, 275 Md. 638, 643-44 (1975)); *see also, Canaras*, 272 Md. at 360; *Food Fair Stores, Inc. v. Blumberg*, 234 Md. 521, 531 (1964). Even in a summary judgment posture, the Bank's decision to reverse a service charge in 1990 cannot be construed as a clear intention to relinquish forever a right to alter the terms of the account. The Kileys' waiver argument was correctly rejected by the trial court.

The Kileys also cannot succeed on the basis of their false advertising or misrepresentation contentions. As we have observed, this argument was predicated on the Bank's letter of June, 1986. The contention was advanced solely to buttress the contract claim, so that appellants did not allege an independent claim of false or deceptive advertising, premised either on consumer protection laws or state or federal banking regulations.

*23 Appellants have not directed us to any Maryland cases involving deceptive advertising claims with facts similar to those in the case sub judice. We have not uncovered any Maryland cases on point. Our

research reveals that the case of *Giummo v. Citibank*, N.A., 436 N.Y.S.2d 172 (1981), though facially similar to the case sub judice, is readily distinguishable.

In *Giummo*, Citibank conducted a "Fire Sale Promotion" in 1978 and offered free checking to its new customers who opened Citibank checking and savings accounts in conjunction with lines of credit. The offer was advertised by signs placed in branch windows and on counters at the bank. In response to the promotion, plaintiff opened an account. But, in August, 1979, Citibank decided to terminate its free checking privileges and imposed a monthly service fee. Thereafter, plaintiff sued Citibank, claiming the bank fraudulently misrepresented the nature of its free checking account offer by not disclosing its reserved right to terminate the account at its own discretion.

The New York court agreed and said that "time or amount requirements for interest rates on deposits . . . must be 'clearly and conspicuously stated' in all advertisements, 12 CFR 217.6(d), (e), and must be 'expressly brought to the attention of the customer.' 12 CFR § 217.4(e)." *Id.* at 173-174. The court further articulated that "'(n)o member bank shall make any advertisement, announcement, or solicitation . . . that is inaccurate or misleading or that misrepresents its deposit contracts.'" *Id.* (quoting 12 C.F.R. § 217.6(g), removed effective *24 March 3, 1993). See also, Md. Com. Law II Code Ann. § 13-301

(1990). As the bank failed to comply, the court awarded nine dollars in compensatory damages for the service charge. incurred by the plaintiff.

The factual distinctions between *Giummo* and the instant matter are noteworthy. First, the Bank's letter of June, 1986 cannot reasonably be construed as an advertisement (see discussion, supra), and the Kileys do not even argue that it was an advertisement. Instead, the Kileys claim that the letter itself constitutes a contract or otherwise supports their claim of an oral agreement. Second, in *Giummo*, the bank changed the account terms after only 15 months. In contrast, the Kiley. enjoyed the favorable terms for over five years. Third, in the case sub judice, if the Kileys and the Bank had a contract in 1986, the parties mutually changed the terms when Ms. Kiley was added to the account in 1991. At that time, the Bank expressly disclosed its reserved right to change certain terms, as discussed infra. Finally, in *Giummo*, the plaintiff claimed that she received no notice of the proposed change in terms, but the Kileys make no such claim here. Thus, Giummo is inapplicable here.

IV. Federal Statutes

The Kileys claim that the Expedited Funds Availability Act ("EFAA"), 12 U.S.C. § 4001 - § 4010 (1988 & Supp. 1993), and 12 C.F.R. § 229.18 (1994), along with the Electronic Funds Transfer *25 Act ("EFTA"), 15 U.S.C. § 1693 (1988 & Supp. 1992), and 12 C.F.R. § 205 (1993), required the Bank to provide at least 21 days of notice before

closing a customer's account. The Kileys' reliance on these statutes is misplaced.

The EFAA regulates, *inter alia*, the time when bank: must make deposit funds available for withdrawal and governs certain disclosure requirements. Specifically, banks must send notice to holders of consumer accounts at least thirty days before implementing a change to a bank's policy regarding availability of deposits. 12 C.F.R. § 229.18(e). The EFAA, however, does not address the notification needed to express an intent to close an account and therefore is not relevant here.

Nor does the EFTA control the length of notice necessary to close an account. Rather, it delineates the rights and liabilities of users of electronic fund transfer systems. 12 C.F.R. § 205.1. According to the EFTA, institutions must disclose certain terms and conditions, such as a summary of the consumer's liability, important telephone numbers, the institution's business hours, the types of transfers a customer may make, and a summary of the institution's liabilities. 12 C.F.R. § 205.7. It also outlines the procedure for changing terms.

> A financial institution shall mail or deliver a written notice to the consumer at least 21 days before the effective date of any change in a term or condition required to be disclosed under § 205.7(a) if the change would result in increased fees or charges, increased liability for the consumer, fewer types of available electronic transfers, or stricter limitations on the frequency or dollar amounts of *26 transfers.

12 C.F.R. § 205.8(a).

IV. Tort Claims

The court entered summary judgment in favor of the Bank on all counts.[6] On appeal, the Kileys pursue only the defamation and wrongful dishonor claims. As to the tort claims, the Bank argued in its motion that it was entitled to summary judgment because it properly dishonored checks written after the "duly announced closure date," and the Kileys failed to mitigate alleged damages. In granting summary judgment, the trial court did not specify which of the Bank's arguments it relied upon in granting the motion.

The Bank dishonored two of the Kileys' checks because of insufficient funds in the account. The Kileys claim that these items were properly payable, and consequently, the Bank is liable for damages.

Maryland recognizes the tort of wrongful dishonor based on Md. Com. Law I Code Ann., § 4-402 (1992). *Boggs v. Citizens Bank & Trust Co.*, 32 Md. App. 500, 501 (1976). Section 4-402 provides that "[a] payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item."

[6] The Kileys' initial complaint contained seven tort claims, including claims for conversion, tortious interference with plaintiff's paycheck, tortious interference with contract, wrongful dishonor, slander, libel, and intentional infliction of emotional distress.

*27 An item is dishonored when presentment is duly made and

acceptance or payment is refused. Md. Com. Law I Code Ann. § 3-507. The dishonor is wrongful when the "bank's refusal is not justifiable pursuant to the Code or an accepted course of dealing with the customer or a recognized usage of trade." *Wright v. Comm'l & Sav. Bank*, 297 Md. 148, 158 (1983).

The obligation of a bank to pay a customer's checks, or its right to refuse payment, depends upon the state of the customer's account at the time of presentment. *See* 10 *Am. Jur. 2d. Banks* § 571, at 542-43 (1963 & supp. 1994). Wrongful dishonor does not apply to "justified dishonor." 5(A) Michie, Ch. 9, § 232, at 903-08 ("(A) bank is under no legal obligation to pay the check of a depositor who has not money to his credit on deposit sufficient to meet the same, and its nonpayment by the bank gives rise to no claim for damages . . . ."). Accordingly, if there are insufficient funds in the customer's account, a bank may rightfully refuse payment.

As we have seen, the Bank attempted to close the Kileys' account on April 29, 1992, and issued a check to the Kileys in an amount representing the balance of their account. The Bank then placed a hold on the account so that the check could be cashed. Yet the Kileys continued to write checks on the account, including one payable to their housekeeper for $40.00, and another payable to Marine Midland Mortgage in the amount of $1,111.87, which was presented after May 1,

1992. The checks were not wrongfully dishonored; they were properly rejected due *28 to insufficient funds at the time of presentation.

Related to the Kileys' wrongful dishonor claim is their assertion that the Bank "slandered" them when it refused to honor the check to the housekeeper, and "libeled" them when it dishonored the mortgage check and marked it "returned for insufficient funds."

> To recover for defamation, a plaintiff must ordinarily establish that the defendant made a defamatory statement to a third person; that the statement was false; that the defendant was legally at fault in making the statement; and that the plaintiff thereby suffered harm. . . . A defamatory statement is one which tends to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or associating with that person.

Rosenberg v. Helinski, 328 Md. 664, 675 (1992), *cert. denied*, 113 S. Ct. 3041. *See also, Metromedia, Inc. v. Hillman*, 285 Md. 161, 172 (1979).

The undisputed evidence does not support the defamation claims. The Kileys' defamation claims fail because the communications in question were not false. To the contrary, appellants' funds were insufficient to cover the checks.

JUDGMENT AFFIRMED;
APPELLANTS TO PAY
THE COSTS.

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

JAMES E. KILEY, JR.,
MARY C. KILEY,

Plaintiffs,

Civil No. 93721

FIRST NATIONAL BANK OF MARYLAND,

Defendant.

HEARING

Rockville, Maryland

January 3, 1994

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

JAMES E. KILEY, JR.,
MARY C. KILEY,

Plaintiffs,

Civil No. 93721

FIRST NATIONAL BANK OF MARYLAND,

Defendant.

Rockville, Maryland

January 3, 1994

WHEREUPON, the proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE WILLIAM C. MILLER

APPEARANCES:

FOR THE PLAINTIFF:

JAMES E. KILEY, JR., pro se
10822 Whiterim Drive
Rockville, Maryland 20854

DEFENDANT:

J. MITCHELL KEARNEY, Esq.
10 Light Street, 1200
Baltimore, Maryland 21202

Motion for Summary Judgement

J. Michael Kearney, for the defendant ..... page 8

James E. Kiley, Jr., for the plaintiffs ..... page 17

Ruling ..... page 27

PROCEEDINGS

THE CLERK: Civil Case No. 93721, James Kiley, Jr., et al. versus First National Bank of Maryland.

MR. KEARNEY: Good morning, Your Honor. Mitch Kearney on behalf of First National Bank of Maryland.

MR. KILEY: Good morning, Your Honor. Jim Kiley, pro se.

THE COURT: We are here on the defendant's Motion for Summary Judgment, is that correct?

MR. KEARNEY: That is correct, Your Honor.

THE COURT: Okay.

MR. KILEY: And my Cross-Motion for Summary Judgment, Your Honor.

THE COURT: Well, hasn't that already been ruled on?

MR. KILEY: My Cross-Motion for Summary Judgment?

THE COURT: There was a hearing on plaintiff's Motion for Summary Judgment. It was denied.

MR. KILEY: Was that a year ago, Your Honor?

THE COURT: Yes.

MR. KILEY: And that was also the defendant's Cross-Motion for Summary Judgment was denied at the same time?

THE COURT: Right.

MR. KILEY: Mr. Kearney filed a Motion for Summary Judgment in October, and I filed a Cross-Motion for Summary Judgment on December 14th. That was in my response to their Motion for Summary Judgment.

THE COURT: All right. Hasn't this been ruled on both ways?

MR. KEARNEY: Well, Your Honor, initially, this thing has sort of a strange procedural history. Initially, there was a Motion to Dismiss filed, frankly on a procedural basis, number one, because plaintiffs agreed to dismissal of the subpoena that was served incorrectly on the bank. The judge I don't think ever really ruled on that. However, we moved to dismiss the complaint based on insufficiencies for a number of reasons.

Many of the claims aren't recognized under Maryland law. Some of the claims contain only claims for punitive damages and no compensatory damages.

I think there is a lot of problems with the complaint. The plaintiff responded to the Motion to Dismiss and also filed a Motion for summary Judgment, at which point I sort of figured, well, you know, I will file a Cross- Motion for Summary Judgment.

This was all done before discovery, Your Honor, and we have since completed discovery. The time for taking it has now run, and I

believe that based on all the evidence adduced through discovery there still is no actionable claim in this case, and that is why we moved again, Your Honor. I don't know whether it should have been correctly styled as a Motion for Reconsideration, but I don't believe the Maryland rules have a limit on filing a motion, and I certainly didn't do it until we finished discovery, and I believe that everything that could possibly come out in this case has come out.

MR. KILEY: Your Honor, may I respond to just that final point?

THE COURT: Yes.

MR. KILEY: You may recall about a month ago I was before you on a Motion for Sanctions, and that was because the discovery hadn't been completed, and as it turns out, you denied my motion.

As it turns out, subsequently they have uncovered 20 pages of handwritten documents and delivered to me when I went to depose four of their individuals.

In addition to that, they have refused me the opportunity voluntarily to depose a number of their individuals, and I currently have a motion pending before this Court for additional time to conduct discovery because of their failure to comply with a court order from this Court concerning discovery.

THE COURT: Is this case set for trial?

MR. KILEY: It is.

MR. KEARNEY: February 14th.

MR. KILEY: Essentially what they have done is they have sandbagged me on discovery, and now at the final hour they have conducted all their discovery, and all of a sudden now I am finding out there is a lot more to the story, and I do have additional information and documentation that proves, first of all, that they are in contempt of court and, even more importantly, that there is a lot more to the story than meets the eye, and if for no other reason, their Motion for Summary Judgment ought to be denied on that matter alone.

MR. KEARNEY: Your Honor, it is absolutely false, and I don't want to bring in a motion that we have already had a hearing scheduled for later on this month, but I will say this: We don't believe there is any merit to these claims.

There is nothing to hide in this case. I have asked the bank. They have produced every document that the plaintiffs asked for. We have voluntarily produced for deposition individuals without requiring them to subpoena them.

On the eve of the deposition of one of these individuals, three months before trial I discovered that she had some handwritten notes that she did not understand that she was supposed to present.

I gave them. I called Mr. Kiley that evening. I gave them to

him that morning. I did not object to a videotape deposition that was taken, I don't think, in compliance with Maryland rules, however.

I want him to get everything that he can get in this case so he can bring it here today and we can resolve this thing because I think it is a frivolous suit, but that notwithstanding, he was able to ask the woman about the notes in excruciating detail about each and every note three months before trial.

There is simply no prejudice, and there was simply no attempt to hide any documents from plaintiff. That notwithstanding, Your Honor, I would like to address the Motion for Summary Judgment.

THE COURT: Let's get to the summary judgment.

MR. KEARNEY: Your Honor, the facts in the case are very straightforward. The plaintiff had a personal checking account with Baltimore Federal Financial sometime in 1986.

When Baltimore Federal Financial got into financial trouble, First National Bank purchased several of the branches, including the one -- the Montgomery Mall branch in which the plaintiffs' account was.

His account was then acquired. He had an interest-bearing, no minimum balance, no service fee checking account with First National, which he had through December of 1991.

In December 1991, First National wrote to all their account holders and said rising costs are forcing us to change pricing on several

accounts; we can no longer offer you the interest-bearing, no minimum balance, no service fee checking feature any longer.

The specific change to his account would be that he would have to have a thousand dollar minimum balance requirement.

He responded and said -- in particular, exhibit D to the motion, Your Honor. You will notice in the last paragraph at the bottom Mr. Kiley states, "While I'm aware that my average monthly balance would probably preclude any service charges being charged against my account under any of the alternatives offered and, further, that a change would not alter the excellent service to which I have become accustomed from the bank, I should not be forced to accept any change in my account merely because these accounts inconvenience the bank."

So they said, okay, well, look, we have the right to do this; why don't you try putting all your money in a savings account, use the phone, shift it over to the checking account when you have to pay your bills. No, you can't do that; you can't make any changes to my account that aren't to my benefit.

For three months, from February, March, all the way into April, they were back and forth, responded to his incessant phone calls and mailings, tried to respond to and tried to satisfy him, and when they couldn't they finally said maybe you ought to think about doing your banking somewhere else where you will be more satisfied, and then he

threatened suit, and then they said enough is enough, we want you -- they sent him a letter on April 15th.

It is exhibit H, Your Honor, to the motion: "With regard to your phone call to the Consumer Affairs Department and our letters to you dated April 7, 1992, we would now like you to close your account with First National Bank of Maryland by April 24, 1992.

"If you do not close your account by that date, we will close your account and mail you a cashier's check for the remaining balance. Please be advised not to write any more checks for they will be returned 'account closed.'"

He admits having received that, I believe on the 18th. He continued to write checks on the account. He did not attempt to close the account, and he did not inform his employer not to direct deposit his paychecks, and when the bank discovered on April 29th that he had not closed the account, the closed it, and they sent him a check for the remaining balance, and unfortunately, he did not instruct his employer not to direct deposit a paycheck.

It came in. There was a hold on the account to pay the check -- you know, the accounting closing check that they sent him, and that allowed the direct deposit to be accepted.

When they discovered that, they paid it out two weeks later. He admits that he got every cent back out of his account. However, he

sues the bank for breach of contract, tortious repudiation of contract, tortious interference with plaintiff's paycheck, tortious interference with contract conversion, wrongful dishonor, libel, slander and intentional infliction of emotional distress, and he is seeking somewhere in the neighborhood of $20 million in punitive damages.

Your Honor, there are really only four issues I think in this case. The first one is did the bank have the right to impose a minimum balance requirement and service charges.

The second one is did the bank have the right to close his account when they refused to accept the changes. The third is did the bank have the right to dishonor the checks after attempting to close the account.

The answer to the first three is yes. The reason is, Your Honor, if you look at the rules and regulations governing personal deposit accounts, which is attached as exhibit J -- and I have a copy for you if you would like to look at it, Your Honor --

THE COURT: All right.

MR. KEARNEY: -- First National Bank, like all banks, has rules and regulations which govern personal deposit accounts, and these apply to every customer at the bank, and you will see on the first page, Your Honor, under "General Information. Welcome to First National Bank of Maryland" it says, "These rules and regulations set forth in this

agreement together with any deposit agreements, funds available statements, policies of the bank," blah, blah, blah, "govern all deposit accounts offered by the bank. You as a deposit customer and the bank agree to abide by the rules and regulations outlined in the various materials."

Now when they made a change in the account and said they were going to impose a minimum balance, you can turn to page six, paragraph two, where it says, "We may establish a minimum balance or a minimum average balance for your account below which a lower interest rate or no interest rate will be accrued or credited or below which interest will be credited only on maturity."

So they had the contractual right to impose that change. They also had the contractual right to impose services charges, paragraph seven on page four: "We may charge you for the various services provided in connection with your accounts. Services charges may be applied directly against your account or related account."

And as far as closing the account, "You or the bank can close an account in compliance with whatever restrictions on length of deposit or notice of withdrawal might be imposed by Federal regulations or by the practices of the bank for that account."

Bank accounts are at will. You or I can go to the bank and take our money out. I think the only restriction on a bank's closing of a

customer's account is that it has to give it reasonable notice for them to take care of all their affairs and make alternative arrangements.

Now the bank in this case gave Mr. Kiley something like 10 days' notice. There is no restriction, there are no policies of the bank, there are no Federal regulations, nothing out there that says how much time a bank gives them.

Mr. Carroll testified in his deposition that that was the normal time that they would give people, and even if Your Honor thought that there maybe was a jury question with respect to whether the notice was reasonable, none of the damages which the plaintiff has alleged in this case have anything to do with lack of reasonable notice.

There was a dishonored check. It was written on April 30th. That was 15 days after he was given notice not to write any more checks and close his account.

So he can't say -- it might be a different story if he had written a check before April 15th and then they dishonored it, but these were all checks after he had been given reasonable notice not to use the account any longer.

Your Honor, the rules and regulations governing the personal deposit accounts show that there was no breach of contract.

Plaintiffs acknowledged receipt of them in their signature card signed by both people. It says prominently on there, "See important

information in rules and regulations governing the personal deposit accounts."

The back of it acknowledges receipt of the Demand Deposit Disclosure Statement and rules and regulations - governing personal deposit accounts.

There is no question that they received them. So all of the bank's action in this case were reasonable and within their contractual rights, and without the breach of contract, all of these remaining counts -- the libel, slander, breach of contract or tortious interference with contract, all of them fall.

There is one other point that I would like to make, Your Honor, and that has to do with the damages here, which I think is truly indicative of how frivolous this lawsuit is.

Even if they could show any type of violation by First National, he hasn't suffered any damages in this case. He admits that First National returned all of the money that was in the account.

He claims that he had a $20.00 returned check charge for the one check that was dishonored, which was written on April 30th, again 15 days after he was given notice and a day after the bank closed the account, and within four days he issued another check through other funds that he procured, a replacement check, and sent it to Marie Midlen, but never told them not to deposit that first check.

It was sent down twice. So it was his own failure to mitigate that resulted in those -- the $20.00 returned check fee. He also claims, well, I defaulted on some of my obligations to my other creditors.

What he is saying is that he got a couple late notices from some of his credit card people, and he claims that he incurred an additional 44 cents in interest due to late payments.

The fact that he made the payments late had nothing to do with First National Bank of Maryland. He had sufficient funds, and he admits it, in all of his accounts to pay these things.

He just says well, I couldn't deal with it because I was so upset and anxious about the bank's behavior in this case that I couldn't write the checks, and that is absurd.

There is no evidence of any injury to his credit standing in this case, and pain and suffering. Your Honor, pain and suffering in a case where there is no physical impact under intentional infliction of emotional distress -- and Your Honor I am sure is aware of the case law -- has to be extreme and outrageous conduct, and the injury has to be severe.

Plaintiff says, well, I had some headaches and some blood in my stools for a while and I was anxious and tense and I couldn't sleep for a while. He admits all that was temporary.

He didn't see a doctor, didn't go to the hospital. He has no

medical testimony to support any of these claims. Finally, Your Honor, he has asked for these $20 million dollars in punitive damages.

We know that with intentional torts the standard is actual malice. I don't know what it is now with non- intentional torts. It may be implied malice still.

I don't think the Court of Appeals has really decided what it is going to do yet. Under either standard, actual or implied, there is not a shred of evidence here that First National was acting in any way with spite or ill will or malice.

They were attempting to stand up to their contractual rights, which they had a right to do, and they tried for three months to satisfy him and they couldn't do it, and only when he threatened litigation did they close the account.

So, Your Honor, I think that there is absolutely no basis for this claim to proceed any further. It is sad that it has gone as long as it has, I think.

Banks are sophisticated entities. They know they are going to get sued, they know they have to pay counsel fees, but in a case where it is totally unwarranted, they have paid me a lot of money to defend and respond to a multitude of pleadings, frivolous motions, 90 or 100-page motions for summary judgment.

Your Honor, I think it is time to end this now.

THE COURT: Mr. Kiley, in your obsession with this case, you have filed so much stuff, I don't see how you can expect anybody on a motion to read it.

MR. KILEY: Your Honor, with all due respect, first of all, I would like to thank Mr. Kearney because he has admitted a number of factors that are very --

THE COURT: Tell me succinctly what your case is about and why we ought to continue with this litigation that has gotten out of hand.

MR. KILEY: May I approach the bench, Your Honor?

THE COURT: Well, if you are going to give me a whole bunch of more documents -- you have already given me more reading material than a Russian novel.

MR. KILEY: Your Honor, if I may --

THE COURT: Just tell me succinctly what your case is about.

MR. KILEY: My case is about broken promises. In 1986 First National Bank of Maryland bought the Montgomery Mall branch from Baltimore Federal Financial. When they did, they sent me a letter dated June 1986 and said, "We want to assure you that any changes made to your accounts will be to your benefit."

That was an assurance and a promise. Under Maryland law,

a bank may not make a representation that is false, misleading or deceptive, and that -- not only did they send me a letter and give me assurances, but because I didn't know anything about First National Bank of Maryland, I went in to close my account, and when I did, the branch manager, Lori Nader, she told me, "Mr. Kiley, we don't want you to close your account; we want you to keep your account open, and we promise you that if you do keep your account open, we will not change any of the terms and benefits that you had in your previous account."

In my previous account, I had free checking with interest, no minimum balance and no monthly charges. Now they have already admitted that those were the terms, and they also admitted that they made those promises to me.

In fact, Mr. Kearney, during the deposition of my wife, said the following: "The bank disputes and has no knowledge of anyone else saying that he would have these terms and conditions for the rest of his life. They did promise him that when he switched over from BFF, Baltimore Federal Financial, to First National that they would not make any changes in his account."

What they promised me is that I would continue to get free checking with interest, no minimum balance and no monthly charges.

Now for four years they honored the contract. In September and October of 1990 -- Your Honor, with your indulgence, I would

appreciate it if you would give me the opportunity to just give you these documents so that you can follow --

THE COURT: I don't want any more documents.

MR. KILEY: Then I will tell you.

THE COURT: You have tried to bury me in documents. You just tell me.

MR. KILEY: In September of 1990, First National Bank of Maryland breached the contract. When they breached the contract, I caught them. They didn't even tell me that they were changing my account. I had one type of account, they changed it to a new type of account; they didn't even tell me about it. When I found out about it, I only found out about it because I got a $15.00 service charge, and I don't even know what that service charge is for.

I assume it was because it was a minimum balance requirement or something. I found out about it, and I went down to the branch on Wisconsin Avenue and I met with a woman by the name of Diane Wallace, and I said, "We have a contract. You made me a promise back in 1986 that I would continue to have these terms and benefits attached to my account."

Diane Wallace looked into it that day, and she called me back later on that afternoon, and she said, "Mr. Kiley, you're absolutely correct. We apologize. We're reversing the fee, and we are going to

credit your account the $15.00, and we're going to change the account back to the same terms you had before."

So they acknowledged, they ratified the preexisting contract and they reversed the fee.

THE COURT: Okay.

MR. KILEY: And that is provable. I have documents that can prove that.

THE COURT: Okay. But where is there any damage there?

MR. KILEY: There was no damage at that time.

THE COURT: Okay.

MR. KILEY: Two years later then they write me a letter and they say we want to breach again, and I said: Wait a minute; we've been through this before. You can't breach. You made me a promise --

THE COURT: Well, let me ask you this: Do you think you have a contract with them for the rest of your life to have free checking and no service charge?

MR. KILEY: Wdl, if I can back up --

THE COURT: No, you answer my question.

MR. KILEY: Yes, I do believe that, and I will tell you why I believe that. Because they promised it to me. They made me a promise. Now the terms and conditions, the rules and regulations of the account that the bank says these apply, well, the bank has never stepped forward

with the original signature card dating from the time when they bought my account.

They can't produce one. Now I don't recall whether I ever signed one. I don't think I did. And if I didn't, then the rules and regulations were never incorporated into the account.

Now in August of 1991 I added my wife as a signatory to my account, but the terms and conditions of that account did not change by me adding her.

The bank continued to honor that contract even after we added my wife as a signatory. So, therefore, they made a promise to me in 1986. I have got all of the bank records for six years showing where they honored the contract.

They paid me interest, they charged me no service fees, they never required a minimum balance requirement, and for six years I have got a course of performance that shows their commitment to the contract.

So we have a firm contract, we have the terms, they have admitted the terms. Mr. Kearney said that they gave us free checking with interest, no minimum balance and everything else.

Now we have established the contract. They haven't proven that the rules and regulations ever came into effect at the time the contract was started. They allege that by me adding my wife, Mary Kiley, to the account in 1991 we signed a new signature card and, yes, the signature

card says that we acknowledge receipt.

All that is is that is a rebuttable presumption that we actually received those rules and regulations. We did not.

We opened a new account for my wife. We did not receive them with respect to the preexisting account. We opened a new account for my wife that day, and when we were discussing the two accounts -- we wanted to open a new account with the same terms as the old one.

The woman we met with said you can't do that because we don't offer that type of account any more; we will offer her this special account that doesn't earn interest, doesn't have any service charges and everything else, but it is not the same as what you used to have.

So, basically, what First National Bank of Maryland did is they came in and said we are going to change this on you, they went ahead and changed it on me, okay? That was in February of 1992.

After February of 1992, I started asking, well, what did you change my account to, you never told me what the new terms of my account were, you gave me four options, you told me you were going to select one of them if I didn't select one, and I rejected their offer. So, therefore, after that I started inquiring what did you change my account to.

They never told me what changes they made to my account. I wrote them letters, I called them, I asked them; they wouldn't tell me

what changes they made to my account.

I didn't know whether I had to maintain a minimum balance or anything else, but I kept trying to get information, and they kept refusing, and finally I got angry, and I did threaten litigation, but let's back up for a minute: Under contract law, the theory of promissory estoppel has been established in the state of Maryland.

There is no question about it. Somebody makes a promise, somebody --

THE COURT: Don't tell me about that. You tell me about what your case is about.

MR. KILEY: Well, my case is about promissory estoppel. They made me promises. I relied on that to my detriment in not closing my account.

They are estopped from denying the terms of the contract that they agreed to. That is what it is about. Okay, so Mr. Kearney has said that if they win on the contract claim, all the other claims fall apart and they are entitled to summary judgment on all the claims.

Well, that is not true. Even if they are entitled to summary judgment -- I mean, even if they might win on the first contract issue -- on the contract issue, they are still liable on all the others, and the reason why I say that is this:

In count two, I said it was tortious -- they tortiously breached

their contract. Now what brings me to that conclusion is that under the Electronic Funds Transfer Act, as codified at 12 CFR 229, and the Expedited Funds Availability Act, subsection 205, 12 -- CFR 12-205, section 205, a bank is required to give 30 days' notice of its intent to make any changes that affect the availability of a consumer's funds in their checking account or in any of their accounts.

Under the Electronic Funds Transfer Act, a bank is required to give at least 21 days' notice of any changes that are going to affect the availability of a consumer to make transfers according to his account.

First National Bank of Maryland has acknowledged that they are required to abide by these laws. In fact, they even publish their own Electronic Fund Transfer Disclosure Statement, and they also publish a First National's Funds Availability Statement.

Those are pursuant to Federal law, and under each of the acts -- this is 12 CFR 205.8 -- "Change in terms, Error Resolution Notice."

THE COURT: Mr. Kiley, you understand -- and I think we may have gone through this last time -- you are limited to a half an hour, and that is 15 minutes a side.

MR. KILEY: Your Honor, forgive me. I am doing the best I can.

THE COURT: You don't do the best you can; you are

limited to 15 minutes. That is a rule, and that applies to lawyers, that applies to non-lawyers, that applies to law students and everybody else.

MR. KILEY: Okay, Your Honor.

THE COURT: So I will give you a little bit more time, but -

MR. KILEY: I am only going to say -- if I may approach the bench once and give you a couple of documents that I want you to be able to review. First National --

THE COURT: No, I don't need any more documents. You filed these documents. You don't think that is enough?

MR. KILEY: Your Honor, we are here on summary judgment. If for no other reason, if I am not entitled to summary judgment based upon the law, then there certainly are questions of fact that have been raised here today about whether those promises created promissory estoppel that stopped them from changing the terms of the contract to begin with.

As a matter of law, I am entitled to judgment on that point because they are estopped. . .

THE COURT: Promissory estoppel involves an unjust enrichment. Where is there any unjust enrichment to the bank?

MR. KILEY: No, Your Honor, promissory estoppel, under -- the law of equitable estoppel is firmly established under Maryland jurisprudence, Kramer versus Tri-County. The definition of equitable

estoppel is that contained in 3J Pomeroy, Equity Jurisprudence:

"Equitable estoppel is the effect of a voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed either of property or of contract or of remedy as against another person who has in good faith relied upon such conduct and has been led thereby to change his position for the worse and who on-his part acquires some corresponding right either of property, of contract or of remedy."

I relied on their promises in not closing my account and continuing the banking relationship with First National Bank of Maryland.

They made me affirmative promises, and they kept those promises for four years, and then they ratified the contract when they breached it the first time, and then they tried to breach it the second time, and I said: Wait a minute; you made me these promises. You just can't do this. But they went ahead and did it, anyway.

They didn't even bother to look into the terms of the contract. I've got it on the video deposition.

THE COURT: Okay. All right. I think your time is up. All right, Mr. Kiley, the longer you talk the more you convince me that your suit is completely frivolous. In the first place, it is the Court's opinion that in this case there is no contract between you and First National Bank

of Maryland for the bank to maintain your money forever at no interest and no balance checking account.

The regulations and rules of the bank do not require it, and basically a bank account is an at will agreement that can be changed by either party, given reasonable notice to the other.

All of the actions of the bank in this case -- and I don't think there is any genuine dispute as to fact, and I think you have become completely obsessed with this case and you have gone overboard.

I don't believe it is a promissory estoppel situation, and that seems to be what you rely upon. I don't think there is any unjust enrichment, and I don't think there is any reasonable right to rely upon the promises that may have been not in accordance with the regulations.

All right, given that fact, I will grant the defendant's Motion for Summary Judgment.

MR. KEARNEY: Thank you, Your Honor.

MR. KILEY: Your Honor, may I --

THE COURT: You can go down to the Court of Appeals.

(Whereupon, the hearing was concluded.)

CERTIFICATE

Compuscribe hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings in the Circuit Court for Montgomery County in the matter of:

CIVIL NO. 93721

JAMES E. KILEY, JR.

MARY C. KILEY

v.

FIRST NATIONAL BANK OF MD.

Mary Lou Leidig, Transcriber

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

JAMES E. KILEY, JR., et al.
Plaintiffs,

v. COMPLAINT No. 93721

FIRST NATIONAL BANK OF MARYLAND, N.A.
Defendant.

AFFIDAVIT

The following is the affidavit, pursuant to Rule 1-304, of Mary C. Kiley,

1. I am over twenty-one years of age and I am competent to testify as to matters set forth herein. This affidavit is made on my personal knowledge.

2. On or about August 22, 1991, both my spouse, James E. Kiley, Jr., and I visited the First National Bank of Maryland, N.A. ("First National" or "Bank") branch office located in the Cabin John Mall Shopping Center with the intent of adding my name to the pre-existing account of my spouse.

3. We met with personnel of the Bank and filled out certain documents to add my name as a signatory to the pre-existing account of my spouse. At no time during this transaction did the Bank's Cabin John Branch representative ever inform, state, hint, suggest, warn, explain, show, indicate or otherwise communicate, to me or to my spouse, so far as I could tell from the events and circumstances, any intent to modify or alter the existing contract except for the purposes of adding my name as a signatory to the account.

4. Nor did any of the Bank's other employees attempt to explain or communicate anything to my spouse or myself, together or alone and privately, that the addition of my name as a signatory would otherwise alter or modify the existing contract or make the existing contract subject to any new or existing Rules or Regulations promulgated by the Bank.

5. The only purpose discussed in relationship to that immediate

transaction was to add my name as a signatory to the pre-existing account of my spouse. No other intent was contemplated by me, and no other intent was communicated to me by either the Bank's personnel or my spouse.

6. At no time during that transaction was I offered, handed, shown, referred to, or told about any Rules and Regulations. Nor was it ever indicated there were any such Rules and Regulations which might be governing my spouse's pre-existing account.

7. Immediately after completing that transaction, I inquired about how I could carry and use checks as well. The Bank's representative suggested opening a "convenience" account so that I could, at any time, transfer money from our main" checking account to this convenience account for my own use. My spouse tried to negotiate with the representative for an account exactly like his existing account, but the representative said such accounts were no longer offered.

8. My spouse and I discussed the benefits of such an account with the representative, and found out the Bank offered such checking accounts but they were not accounts which earned interest, but they had no minimum balance requirements. Because we did not anticipate a great need for this account, and thought it fair, we agreed to open a new "convenience" account for my use only.

9. I completed the all of the paperwork required to establish this "convenience" account for me, and my spouse's name was not added to the account because he felt it was unnecessary. The Bank's representative then handed me some starter checks, some brochures and other papers, but I do not recall what those documents were aside from the checks. It was clear, however, that all of the documents given to me related only to the new account. Shortly thereafter, we left and went home.

10. This "convenience" account was maintained in good standing during the entire time it was open. We recently closed the account because we have decided to bank elsewhere under the circumstances. At no time did I ever earn interest, or pay any fees related to this account, nor were there any other interactions between myself and the Bank until I cashed a check on April 25, 1992, at the Cabin John Branch. Aside from the current litigation, I have had no interaction since that time.

11. At no time during the initial transaction was I or my spouse, so far as I could tell from the events and circumstances, ever led to believe the Bank intended to do anything or conduct any transaction or modify any of the existing terms related to my spouse's pre- existing account; nor have I or my spouse ever, so far as I could tell from the events and circumstances, from any ensuing transaction or interaction, ever understood or believed that either I or we had agreed, individually or jointly, with the Bank to modify the terms of the pre-existing account, nor did I ever perceive that the Bank intended to do so during these transactions.

I solemnly affirm under the penalties of perjury that the contents of the foregoing affidavit are true and correct to the best of my personal knowledge, information, and belief.

/s/ Mary C. Kiley
Affiant

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

JAMES E. KILEY, JR., et al.
Plaintiffs,

v. COMPLAINT No. 93721

FIRST NATIONAL BANK OF MARYLAND, NA.
Defendant.

AFFIDAVIT

The following is the affidavit, pursuant to Rule 1-304, of James E. Kiley, Jr.

1. I am over twenty-one years of age and I am competent to testify as to matters set forth herein. This affidavit is made on my personal knowledge.

2. On or about August 22, 1991, both my spouse, Mary C. Kiley, and I visited the First National Bank of Maryland, N.A. ("First National" or "Bank") branch office located in the Cabin John Male Shopping Center with the intent of adding my spouse's name to my pre-existing account.

3. We met with personnel of the Bank and filled out certain documents to add her name as a signatory to my pre-existing account. At no time during this transaction did the Bank's Cabin John Branch representative ever inform, state, hint, suggest, warn, explain, show, indicate or otherwise communicate with me or my spouse, so far as I could tell from the events and circumstances, any intent to modify or alter the existing contract except for the purposes of adding my wife's name as a signatory to the account.

4. Nor did any of the Bank's other employees attempt to explain or communicate anything to my spouse or myself, together or alone and privately, that the addition of my spouse's name as a signatory would otherwise alter or modify the existing contract or make the existing contract subject to any new or existing Rules or Regulations promulgated by the Bank.

5. The only purpose discussed in relationship to that immediate transaction was to add my spouse's name as a signatory to the pre-existing account of my spouse. No other intent was contemplated by me, and no other intent was communicated to me by either the Bank's personnel or my spouse.

6. At no time during that transaction was I offered, handed, shown, referred to, or told about any Rules and Regulations. Nor was it ever indicated there were any such Rules and Regulations which might be governing my pre-existing account.

7. Immediately after completing that transaction, Mary inquired about how she could obtain access to and use the checks as well. The Bank's representative suggested we open a "convenience" account so that she could, at any time, transfer money from our "main" checking account to this convenience account for her own use. I tried to negotiate with the representative for an account exactly like my existing account, but the representative said such accounts were no longer offered.

8. My spouse and I discussed the benefits of such an account with the representative, and found out the Bank offered such checking accounts. We were told these type of accounts were not accounts which earned interest, however, they had no minimum balance requirements because we did not anticipate a great need for this account, and thought it fair, we agreed to open a new "convenience" account for my spouse's use only.

9. Mary completed the all of the paperwork required to establish this "convenience" account, for her sole use. My name was not added to the account because I felt it was unnecessary. The Bank's representative then handed her some starter checks and some brochures and other papers, but I do not recall what those documents were beside from the checks. It was clear, however, that all of the documents given to Mary related only to the new account. Shortly thereafter, we left and went home.

10. This "convenience" account was maintained in good standing during the entire time it was open. We recently closed the account because we have decided to bank elsewhere under the circumstances. At no time did the account ever earn interest, nor pay any fees related to Mary's account.

11. At no time during the initial transaction was I or my spouse, so far as I could tell from the events and circumstances, ever led

to believe the Bank intended to do anything or conduct any transaction or modify any of the existing terms related to my pre-existing account; nor have I or my spouse ever, so far as I could tell from the events and circumstances, from any ensuing transaction or interaction, ever understood or believed that either I or we had agreed, individually or jointly, with the Bank to modify the terms of the pre-existing account, nor ever perceived that the Bank intended to do so during these transactions.

I solemnly affirm under the penalties of perjury that the contents of the foregoing affidavit are true and correct to the best of personal knowledge, information, and belief.

/s/ James E. Kiley, Jr.
Affiant

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

JAMES E. KILEY, JR., et al.
Plaintiffs,

v. COMPLAINT No. 93721

FIRST NATIONAL BANK OF MARYLAND, N.A.
Defendant.

AFFIDAVIT

The following is the affidavit, pursuant to Rule 1-304, of Mary C. Kiley,

1. I am over twenty-one years of age and I am competent to testify as to matters set forth herein. This affidavit is made on my personal knowledge.

2. During the latter part of April, immediately following the notice from the First National Bank of Maryland that they intended to close our personal checking account, my husband, James E. Kiley, Jr., began suffering from insomnia, anxiety, and depression.

3. When the Bank didn't close the account on April 24, 1992, he experienced a huge sigh of relief. We knew the Bank didn't close the account because I went to the Cabin John Branch and cashed a check for $200.00 on Saturday, April 25, 1992. He believed the bank had finally looked at the contract and decided to reexamine its position. He had been waiting for months for the Bank's employees to explain why they felt they could break their contract with us, and believed that either the bank was now going to explain why, or was going to reinstate the terms of the contract.

4. Then on Friday, April 30, we wrote a check to Vanessa Defreitas, a housecleaner, who had at the time recently begun working for us. After cleaning our home, she left and apparently went to cash the check. Later that evening we got the message that she had left for us that afternoon that the Bank refused to cash the check. My husband went ballistic. He was absolutely infuriated that the Bank would not honor the check, although, at that point, we still didn't know the Bank had closed our checking account. He was unable to sleep or study over that weekend and for several weeks thereafter.

5. Late Monday night, May 4, after he got home from school, he found the letter from the Bank saying the Bank closed the account. Soon thereafter, he began complaining of severe stomach pain and of blood in his stools. Prior to this incident, my husband has never had never had any problems with either stomach pain or bleeding. He also suffered from severe migraine headaches, anger, irritability, excessive fatigue, fear and despair.

6. During the time of the dispute, from some time in February up until the day he first found out the Bank actually closed the checking account, he never once believed that the Bank would actually close the account. He was completely shocked when the Bank closed the account. After six years of banking with the same institution, he had known many of the Bank's tellers and Branch Managers on a first name basis. He expected the Bank to live up to its word and honor its contract, as he takes extreme pride in honoring his own. He was very distraught and complained that he felt like he had lost a friend. For several weeks he was extremely depressed and angry, especially because he felt betrayed.

7. When the paycheck fiasco surfaced, he went ballistic again. Alternating between severe depression and extreme hostility, he was unable to sleep or study during his final exams in the Spring semester. He was unable to concentrate because of his depression, fatigue, and anger. Concern about his inability to pay our bills worried him and caused him severe anxiety and fear-that our credit history would be ruined by this episode. His grades last semester were the lowest he has had in his law school career, and it is clearly because of his inability to sleep, study and concentrate during finals last year. His substandard performance last spring has depressed him even further.

8. He was extremely embarrassed about having to borrow money from his mother in order to pay our mortgage payment. His mother couldn't afford to lend us any more, but gave us groceries for several weeks so that we could eat. He was completely humiliated because of being forced into accepting the groceries and depressed about having to write letters to our creditors explaining why our payments were late, neither of which we had never had to do before. He still can't believe the Bank would treat its customers in the manner that it did. He was extremely depressed about being insolvent. For the first several weeks, he couldn't function. He avoided going out and avoided his friends because he was embarrassed about our situation.

9. During the several months since the closing of the account, he has gone through periods of anger and depression. Emotionally, he has been much more volatile and irritable than I have ever known previously. He has become so angry at what he used to believe was the best bank in town. He used to recommend the Bank to everyone; now he tells everyone he meets about how the First National Bank of Maryland treated us.

I solemnly affirm under the penalties of perjury that the contents of the foregoing affidavit are true and correct to the best of personal knowledge, information, and belief.

//s Mary C. Kiley

Affiant

AFFIDAVIT

The following is the affidavit of Vanessa Defreitas:

1. I am over twenty-one years of age and I am competent to testify as to matters set forth herein. This affidavit is made on my personal knowledge.

2. On Friday, May 1, 1992, I went to the home of James E. Kiley, Jr. and Mary C. Kiley to clean their home. Mr. Kiley left a check for me as we had previously agreed. After cleaning the Kiley's residence, I took the check and left.

3. After I left the Kiley's residence, I drove to the Quince Orchard Branch of the First National Bank of Maryland to cash the check. I had a doctor's appointment that morning and needed the cash to pay the doctor because I didn't have a checking account at the time. I was relying on the cash to pay for my appointment. I went to this branch because it was very close to the doctor's office.

4. When I arrived at the branch, I went to the drive-in window and endorsed the check on the back and requested that the teller cash the check.

5. The teller said that the Bank could not cash the check. When I asked her why she could not cash the check she said, "We cannot cash this check. The account has insufficient funds."

6. I explained that I just received the check and that I was going to the Doctor's office and that urgently I needed the money. I asked her why Mr. Kiley would write me a check if there wasn't enough money in the account. The woman said, "I'm sorry, I cannot tell you why, I just cannot cash the check."

7. Because the Bank would not cash the check and because I did not have the cash to pay the doctor, I had to cancel my appointment with the doctor. I was very angry because the appointment was very important and I needed the money.

8. That afternoon I called the Kileys to tell them the Bank would not cash the check. I left a message on their answering machine at their home telling them I went to the Bank to cash the check and that the Bank refused to cash it. I was very angry with the Kileys.

9. Because I thought that Mr. Kiley did not have enough money in his account but would probably deposit money soon, I took the check and endorsed it to my friend who deposited it in her Bank account and gave me cash.

10. The next day Mr. Kiley called and left a message for me. He apologized and explained that he was having a problem with his bank account. He promised to pay me as soon as it was possible. Because I did not get his message until a few days later, I didn't tell him that my friend had deposited the check into her account.

11. My friend never said there was a problem with the check, so I assumed Mr. Kiley had deposited more money into his account. The check has not come back.

I hereby solemnly certify under the penalties of perjury that the contents of the foregoing affidavit are true and correct to the best of my personal knowledge.

/s/ Vanessa Defreitas
Affiant

JAMES E. KILEY, JR. and MARY C. KILEY Plaintiffs	•	IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY
v.	•	
FIRST NATIONAL BANK OF MARYLAND Defendant	•	Case No. 93721

• • • • • • • • • •

ANSWERS TO INTERROGATORIES

First National Bank of Maryland, Defendant, by its undersigned attorneys, in answer to the Interrogatories propounded by Plaintiff James E. Kiley, Jr., states as follows:

• • •

INTERROGATORY NO. 15:

Identify with particularity the date (the banking day or business day) on which First National received Mrs. Kiley's electronically-transferred paycheck, the date on which First National credited the Plaintiffs' account or deposited the check into the Plaintiffs' account and the earliest date First National made those funds available to the Plaintiffs.

ANSWER TO INTERROGATORY NO. 15:

Defendant received the advice of an electronic deposit to the Plaintiffs' account in the amount of $877.06 on Friday, May 1, 1992. Although the account was technically closed on April 29, 1992, an electronic hold was placed on the account to allow the Plaintiffs to cash their account closing check. While the account was on hold, the electronic deposit was initiated by the Plaintiffs, despite Defendant's warning not to use the account. Representatives of the Defendant

familiar with the situation involving Plaintiffs' account did not "catch" the electronic transaction, and because a hold was placed on the account in order for the Plaintiffs to cash their account closing check, the deposit was credited to the account. The funds were made available on the next business day, Monday, May 4, 1992.

INTERROGATORY NO. 16:

State with particularity the date (the banking day or business day) First National first received Plaintiffs' check, number 3861, for payment; identify the check processing system, automated clearinghouse, or check clearinghouse association through which the check was transmitted from the Depositary Bank to First National for payment; state with particularity the date (the banking day or business day) First National first refused to honor (pay) Plaintiffs' check number 3861; state the account balance of the Plaintiffs' checking account at the beginning of the banking day on which the check was first dishonored; state the account balance of the Plaintiffs' checking account at the end of the banking day on which the check was first dishonored; state the date the check was first transmitted back to the depositary bank; and identify any documents or records which concern, refer or relate to the dishonor of Plaintiffs' check number 3861.

ANSWER TO INTERROGATORY NO. 16:

Check No. 3861 was received on May 7, 1992 from Marine Midland Bank, N.A., in Buffalo, New York. The check was returned unpaid to Marine Midland Bank, N.A. on the same date for insufficient funds. The amount of available funds in Plaintiffs' account on both the beginning and end of the day on May 7, 1992 was approximately $198.46. The only documents relating to the dishonor of Plaintiffs' check is the Plaintiffs' check itself.

• • •

I SOLEMNLY SWEAR AND AFFIRM UNDER THE PENALTY

OF PERJURY THAT THE CONTENTS OF THE FOREGOING ANSWERS TO INTERROGATORIES ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

FIRST NATIONAL BANK OF MARYLAND

By: //s Richard J. Carroll, Jr.
Vice President and
Associate Counsel

//s J. Mitchell Kearney
J. Mitchell Kearney
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(410) 727-6464

Attorneys for Defendant, First
National Bank of Maryland

JAMES E. KILEY, JR. and MARY C. KILEY Plaintiffs	*	IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY
v.	*	
FIRST NATIONAL BANK OF MARYLAND Defendant	*	Case No. 93721

DEFENDANT'S RESPONSE TO PLAINTIFF'S SECOND REQUEST FOR PRODUCTION, INSPECTION, AND COPYING OF DOCUMENTS, ETC.

First National Bank of Maryland, Defendant, by its undersigned attorneys, in response to Plaintiff's Second Request for Production, Inspection, and Copying of Documents, Etc., states as follows:

* * *

REQUEST NO. 6:

Copies of any and all documents acknowledged or signed by Plaintiff James E. Kiley, Jr. pertaining to, or related to, the transfer and/or opening of Plaintiff's checking account with the Defendant on or about July, 1986, including, but not limited to, any signature cards, contracts, agreements, acknowledgments or other documents.

RESPONSE TO REQUEST NO. 6:

Defendant has been unable to locate any documents responsive to this request.

* * *

//s J. Mitchell Kearney
J. Mitchell Kearney
MILES & STOCKBRIDGE
10 Light Street
Baltimore, Maryland 21202
(410) 727-6464
Attorneys for Defendant, First National Bank of Maryland

First Financial Report
A Statement of Your Accounts
with First National Bank

1st First National Bank
of Maryland

James E. Kiley, Jr.
Mary C. Kiley

May 14, 1992
Page 2

STMT ID #0205-86203213448
Checking Account #414-0265-5
1308

Checking With Interest #414-0265-5 James E. Kiley, Jr. Mary C. Kiley

TAX ID #578-88-4470

Beginning Balance	$	2,102.74
Deposits, Other Additions	+	1,664.33
Easy-Bank Withdrawals	-	.00
Checks, Other Withdrawals	-	3,570.61
Ending Balance	$	196.46

Annual Interest Rate	3.5%
Effective Annual Yield	3.55%
Interest This Period	.00
Interest This Year	33.68

Checks Paid This Period ** Denotes Missing Sequence Numbers

1001 ** 2100 ** 3041 ** 3841 ** 3853 3854 3855 3856
3857 3858 3859 ** 5168

Transactions Details

Date	Description	Amount	Balance
04/16	Beginning Balance		$ 2,102.74
04/20	Authorized Direct Deposit Payroll Embassy Suites,	783.77+	2,886.51
04/20	Check 3855	40.00-	2,846.51
04/20	Check 3853	350.00-	2,496.51
04/20	Check 1001	211.46-	2,285.05
04/21	Authorized Direct Deposit Service Fe Checkfree 578884470	3.50+	2,288.55
04/21	Authorized Direct Payment Billing Checkfree 578884470	9.95-	2,278.60
04/21	Check 2100	15.50-	2,263.10
04/23	Check 3856	384.46-	1,878.64
04/27	Check 3857	200.00-	1,678.64
04/28	Check 3854	313.91-	1,364.73
04/28	Check 3041	76.74-	1,287.99
04/28	Check 3859	62.03-	1,225.96
04/28	Check 3858	53.75-	1,172.21
04/28	Check 5168	45.88-	1,126.33
04/28	Check 3841	7.50-	1,118.83
04/30	Check or Debit Memo	636.36-	482.47

05/04	Deposit	877.06+	1,359.53
05/05	Check or Debit Memo	40.00-	1,319.53
05/08	Check or Debit Memo	1,121.07-	198.46
05/08	Check or Debit Memo	2.00-	196.46
05/14	Ending Balance		$ 196.46